87-1667

NO. 88-

Supreme Court, U.S.
FILED
FEB 29 1988
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

TERM, 1988

GREGORY KIRK BELL,

PETITIONER

V.

UNITED STATES OF AMERICA,

RESPONDENT

PETITION FOR WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

GREGORY KIRK BELL-PRO SE
01008-084
P. O. BOX 600
EGLIN A. F. B.
FLORIDA
32542-7606

89 PP

QUESTIONS PRESENTED FOR REVIEW

(1) WHETHER PETITIONER, GREGORY KIRK BELL, WAS DENIED A FAIR TRIAL IN THAT HE WAS FORCED TO PROCEED WITH COUNSEL NOT OF HIS CHOOSING AFTER RETAINED COUNSEL BECAME UNAVAILABLE MID-TRIAL?

(2) WHETHER PETITIONER, GREGORY KIRK BELL, WAS IMPROPERLY TRIED BASED UPON THE SAME FACTS UPON WHICH A JURY VERDICT OF ACQUITTAL HAD PREVIOUSLY BEEN RETURNED, IN VIOLATION OF THE DOCTRINE OF COLLATERAL ESTOPPEL AS INCORPORATED IN THE DOUBLE JEOPARDY CLAUSE OF THE FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION?

TABLE OF CONTENTS

page

TABLE OF AUTHORITIES . . . . . i-iv

PETITION FOR WRIT 1

APPEAL COURT'S OPINION 2

STATEMENT OF JURISDICTION 2

CONSTITUTIONAL PROVISIONS INVOLVED 3

STATEMENT OF THE CASE 3

STATEMENT OF THE FACTS

ISSUE I 5

ISSUE II 9

ARGUMENT FOR WRIT OF CERTIORARI

ISSUE I 11

ISSUE II 32

CONCLUSION 50

PROOF OF SERVICE 51

APPENDIX

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT-OPINION . . . . . A-1 - A-15

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT-ORDER ON PETITION FOR REHEARING A-16- A-17

AFFIDAVIT OF LANE VAUGHN A-18

AFFIDAVIT OF LANE VAUGHN A-20

AFFIDAVIT OF LANE VAUGHN A-22

AFFIDAVIT OF JOE SHARIT,III A-25

AFFIDAVIT OF JOE SHARIT,III A-27

DISTRICT COURT'S ADMITTANCE ORDER A-29

**********NOTE**********

ORIGINAL AFFIDAVITS FROM VAUGHN AND SHARIT WERE FILED WITH THE ORIGINAL PETITION FOR REHEARING WITH SUGGESTION FOR REHEARING EN BANC, WHICH IS A PART OF THE OFFICIAL COURT RECORD, DOCKET NUMBER 436129.

****

TABLE OF AUTHORITIES

pages

Albert v. Montgomery
732 F.2d 865 (11th Cir. 1984) 45,46

Ashe v. Swenson
397 U.S. 436, 90 S.Ct. 1189,
25 L.Ed.2d 469 (1970) 35

Avery v. Alabama
308 U.S. 444,446, 60 S.Ct. 321,322,
84 L.Ed. 377 (1940) 15

Blackburn v. Cross
510 F.2d 1014 (5th Cir. 1975) 39

Chandler v. Fretag
348 U.S. 3,10, 75 S.Ct. 1,5,
99 L.Ed. 4 (1954) 17

Chapman v. California
386 U.S. 18,23, 87 S.Ct. 824,827,
17 L.Ed.2d 705 (1967) 48

Crooker v. California
357 U.S. 433,439, 78 S.Ct. 1287,1291,
2 L.Ed.2d 1448 (1958) 17

Faretta v. California
422 U.S. 806,821, 95 S.Ct. 2525,
45 L.Ed.2d 562,573 (1975) 16

Gandy v. Alabama
569 F.2d 1318 (5th Cir. 1978) 26

Giacalone v. Lucas
445 F.2d 1238, 1240-43 (6th Cir. 1971)
cert. denied 405 U.S. 922 (1972) 29,A-11

Glasser v. United States
315 U.S. 60,70, 62 S.Ct. 457,464,
86 L.Ed. 680 (1942) 26,13

Herring v. New York
422 U.S. 853, 95 S.Ct. 2550,
45 L.Ed.2d 593 (1975) 17

Jones v. Cunningham
313 F.2d 347 (4th Cir. 1963) 29

Johnson v. Estelle
506 F.2d 347 (5th Cir. 1975) 39

Linton v. Perini
656 F.2d 207,209 (6th Cir. 1981) 25

Lofton v. Procunier
487 F.2d 434,435 (9th Cir. 1973) 29,A-11

Martin v. Commonwealth of Virginia
365 F.2d 549 (4th Cir. 1966) 29

Powell v. Alabama
287 U.S. 45,53, 53 S.Ct. 55,58,
77 L.Ed. 158 (1932) 13

Releford v. United States
288 F.2d 298 (9th Cir. 1961) 26

Rolon Marxuach v. United States
398 F.2d 548,550-51 (1st Cir. 1968)
cert. denied 393 U.S. 982 (1968) 29,A-12

Stokes v. Peyton
437 F.2d 131 (4th Cir. 1970) 29

Twifford v. Peyton
372 F.2d 670 (4th Cir. 1967) 29

United States v. Castro
629 F.2d 456 (7th Cir. 1980) 44

United States v. Gornto
792 F.2d 1028 (11th Cir. 1986) 46

United States v. Johnson
697 F.2d 735 (6th Cir. 1983) 43,44

United States v. Keller
624 F.2d 1154 (3rd Cir. 1980) 38

United States v. Koblitz
803 F.2d 1523 (11th Cir. 1986) 28

United States v. Kramer
289 F.2d 909 (2nd Cir. 1961) 36,37

United States v. Larkin
605 F.2d 1360 (5th Cir. 1979) 39

United States v. Lee
622 F.2d 787 (5th Cir. 1980) 39-41

United States v. Magnus
743 F.2d 517 (7th Cir. 1984) 45

United States v. Mardian
546 F.2d 973 (D.C. Cir. 1976) 22,23

United States v. McManaman
653 F.2d 458,459-61 (10th Cir. 1981) . . 29,A-11

United States v. Mespoulede
597 F.2d 329 (2nd Cir. 1979) 36,37

United States v. Middleton
673 F.2d 31 (1st Cir. 1982) 47

United States v. Mock
604 F.2d 341 (5th Cir. 1979) 39,42

United States v.Nelson
599 F.2d 714 (5th Cir. 1979) 39,42

United States v. Seale
461 F.2d 345 (7th Cir. 1972) 27

United States v. Tramunti
513 F.2d 1087 (2nd Cir. 1975) 27

Wilson v. Mintzes
761 F.2d 275 (6th Cir. 1985) 25

Wingate v. Wainright
464 F.2d 209 (5th Cir. 1972) 39

Yawn v. United States
244 F.2d 235,238 (5th Cir. 1957) 39

Constitutional Amendments

Amendment V 5,32

Amendment VI 5,32

Statutes

Title 21, United States Code, Section 846 . . .3

IN THE

SUPREME COURT OF THE UNITED STATES

1988 TERM

GREGORY KIRK BELL,

PETITIONER

V.

UNITED STATES OF AMERICA,

RESPONDENT

PETITION FOR WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

THE PETITIONER, GREGORY KIRK BELL, respectfully prays that a writ of certiorari be granted to review the judgment of the United Court of Appeals for the Fourth Circuit, which was entered on October 1, 1987.

APPEAL COURT'S OPINION

The United States Court of Appeals for the Fourth Circuit entered its per curiam unpublished opinion affirming the Petitioner's judgment of conviction on October 1, 1987, a copy of which is hereto attached as Appendix A-1 thru A-15.

The Court also denied the Petitioner's petition for rehearing and suggestion for rehearing en banc on December 29, 1987. A copy of the ORDER is hereto attached as Appendix A-16 thru A-17.

STATEMENT OF JURISDICTION

The United States Court of Appeals for the Fourth Circuit entered its judgment affirming the conviction of this Petitioner on the first of October, 1987. [A-1 - A-15]. The Fourth Circuit subsequently denied Petitioner's petition for rehearing en banc after there having been no request for a poll of the Court to rehear the case en banc.[A-17]. The petition for rehearing was also denied after consideration by the panel on December 29, 1987. [A-17].

The jurisdiction of this Court is hereby invoked under Title 28, United States Code, Section 1254(1), and also under the Rules of the Supreme Court of the United States, Rule 17(1)(a).

CONSTITUTIONAL PROVISIONS INVOLVED

(1) United States Constitution, Amendment VI

> In all criminal prosecutions, the accused shall enjoy the right.... to have the Assistance of Counsel for his defense.

(2) United States Constitution, Amendment V

> ...nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb.

STATEMENT OF THE CASE

On July 17, 1985, the Petitioner (and others) was indicted in the United States District Court for the Western District of Virginia, at Roanoke, for conspiracy to possess with intent to distribute cocaine and marijuana, a violation of Title 21, United States Code, Section 846. Following a jury trial before the Honorable Chief Judge James C. Turk, the Petitioner was convicted of such offense on

January 17, 1986. Petitioner was sentenced on May 12, 1986, to a term of incarceration of nine years and also assessed a fine in the amount of $15,000.00 dollars.

Petitioner then appealed his conviction to the United States Court of Appeals for the Fourth Circuit. After oral argument was heard on May 7, 1987, Petitioner then dismissed his counsel and filed a motion for leave to proceed pro se in order to file additional arguments and citations. On July 22, 1987, the Petitioner's motion was granted and thus such supplemental memorandum was filed with the Court. On October 1, 1987, the Appeals Court affirmed the judgment of conviction. The Petitioner's petition for rehearing with suggestion for rehearing en banc was subsequently denied on December 29, 1987.

This Petition For Writ Of Certiorari is thus timely filed, as such petition was filed with the Clerk within 60 days from the date of the denial of rehearing, which shall be February 29, 1988. (as prescribed by Supreme Court Rule 20.4).

STATEMENT OF THE FACTS

In accordance with Supreme Court Rule 21.1(g), Petitioner will briefly relate the facts that are material to the QUESTIONS PRESENTED FOR REVIEW.

ISSUE I

Petitioner was represented through the beginning days of the trial by retained counsel, Lane Vaughn, of Melbourne, Florida. Mr. Vaughn was being assisted in legal research by his associate, Joe Sharit III.

The trial started on Monday, January 6, 1986. On the second day of trial, Vaughn became ill with a stomach flu and sought medical attention at the Roanoke Hospital. During Vaughn's absence, the Court contemplated as to what alternatives were available in the event Vaughn was to be hospitalized for his illness. Cognizant of the fact that Petitioner was unwilling to proceed without Vaughn's representation, Judge Turk declared a two day continuance in order that Vaughn could recover from his illness. The trial was resumed on

the following Thursday, January 9, 1986. (TR. VOL. II, pages 88-91).

Up until the sixth day of trial (Tuesday, January 14, 1986), Vaughn had made all appearances before the jury, had made the opening statements, and had cross-examined all of the Government's witnesses. On the sixth day of trial, Vaughn was informed that his father had suffered a heart atttack from which he was expected to survive no more than 24-48 hours. Due to this traumatic event, Vaughn advised Judge Turk that he would be unable to further proceed with the trial and asked the Court permission to be excused. Judge Turk granted Vaughn's wish but noted that the trial would continue in his absence with associate counsel Sharit. Vaughn then stated that the problem with continuing the trial without him was the fact that Sharit had not been present throughout the trial to hear all of the testimony of the Government's witnesses and that Sharit was not admitted to practice in the Western District of Virginia. The

Court then gave Vaughn the option to leave and let associate counsel Sharit assume the role of counsel or to remain and continue to represent the Petitioner. (TR. VOL. VI, page 243).

On the seventh day of trial, and thereafter, retained counsel, Lane Vaughn, failed to appear in Court, whereby the Judge required the Petitioner to proceed with associate counsel Sharit. Notwithstanding the fact that Petitioner strongly objected to continuing the trial in the absence of his retained attorney and further objected to being represented by associate counsel Sharit, and notwithstanding the fact that Sharit was not present in the courtroom to hear the testimony of the chief government witness against Petitioner, the Judge ordered attorney Sharit to proceed with the trial. The Court acknowledged on the record that it was displeased with Vaughn's tactics in order to gain a severance and delay the case. Judge Turk stated that upon talking with the doctor at Roanoke Hospital,

it was learned that Vaughn did not need to be admitted or kept overnight. Furthermore, "the doctor informed the Court that he knew of no reason why Mr. Vaughn couldn't be over here trying the case at that time." The Court also knew nothing about the condition of Vaughn's father and stated that "most attorneys do not act in this Court like he has acted." (TR. VOL. VII, pages 75-78).

Since Vaughn was not present to address the record, Petitioner has procured an affidavit from Vaughn to correct the misrepresentation as stated by Judge Turk. (See A-22 thru A-24). Although Petitioner realizes that Vaughn's affidavit is not a part of the Official Court Record, with this Court's indulgence, an examination of such affidavit will reveal a more accurate account of the circumstances of this case.

Sharit's motion to sever was then overruled. Judge Turk then granted Sharit a short recess to further discuss the case with the Petitioner. After this short recess, Petitioner

and Sharit announced to the Court that the defense rests. Thereafter, Petitioner presented no evidence, testimony or witnesses on his behalf. (TR. VOL. VII, pages 78-79).

ISSUE II

On the third day of trial, the Government sought to introduce evidence that the Petitioner had taken possession of a tractor-trailer in New Orleans, Louisiana, of which contained 293 concealed boxes of marijuana. Objections were raised that said events were not direct evidence of the conspiracy charged herein and that said evidence should not be admissible as prior similar acts under Federal Rules of Evidence, Rule 404(b). (TR. VOL. III, pages 246-249).

Objections were further raised based upon Petitioner's Fifth Amendment protection against double jeopardy. It was alleged that the New Orleans events were previously the subject of a Federal prosecution, that the initial trial ended in a mistrial, and the second trial resulted in an acquittal of Counts I and II

(conspiracy to import and conspiracy to possess with intent to distribute marijuana) and a mistrial as to Count III (possession with intent to distribute marijuana). [TR. VOL. III, pages 236-241].

After denying to the Petitioner the right to discuss the facts as they related to the New Orleans prosecution, Judge Turk admitted said testimony as direct evidence, having occurred in furtherance of the conspiracy. [TR. VOL. III, pages 238-241].

Earlier in the trial, a Government witness had testified that the Petitioner had partiallly paid for a kilo of cocaine with four boxes of highly compressed marijuana in February of 1983. Prior to the trial in Roanoke, Virginia, it was discovered that a U.S. Customs agent in New Orleans still had a box of marijuana that was used as evidence in the Petitioner's previous trial. This box was similar to the four boxes that were described by the government witness.

Of most importance is the fact that this

specific box of marijuana was seized in New Orleans on June 24, 1983, almost five months after the alleged payment to the government witness.

ARGUMENT FOR WRIT OF CERTIORARI

ISSUE I

The United States Court of Appeals for the Fourth Circuit has erroneously rendered a decision in this Petitioner's cause which is in direct conflict with previous decisions decided by other federal court of appeals. The opinion authored by the Appellante Court panel is also incongruous with historic decisions that have been rendered by this United States Supreme Court. Therefore, Petitioner will attempt to illustrate numerous cases that are in support of his cause and provide this Court with substantive affidavits that were executed by both his former attorneys who represented this Petitioner at trial in Roanoke.

The right to choose one's counsel is crucial in a difficult conspiracy case featuring disparately condemnatory evidence against several

co-defendants, such as the case at bar. Although the trial judge's concern to expedite the trial is most commendable, expedition should not be pursued at the cost of the quality of justice. The trial judge has a responsibility to protect the constitutional rights of the accused. The judge was informed of Vaughn's fathers' heart attack prior to recessing trial on the sixth day and chose to proceed with the prosecution of the Petitioner without his lead counsel. This decision to proceed was done without the expressed consent or waiver of the Petitioner. In fact, the trial judge never invited the Petitioner to make a statement or listen to his reasons for being dissatisfied with substitute counsel. Petitioner did not discharge his chosen counsel, so there was never an issue as to being dissatisfied with chosen counsel or wanting to change counsel at mid-trial. The trial judge granted Petitioner's chosen counsel permission to abandon him at mid-trial.

The panel's opinion has failed to recog-

nize notable Supreme Court cases that protect a defendant's cherished right to employ counsel of his choice. "It is axiomatic that in all criminal prosecutions, the accused enjoys the right to have assistance of counsel for his defense, and implicit in this guarantee is the right to be represented by counsel of one's own choice....When a court unreasonably denies defendant counsel of choice, the denial can rise to the level of a constitutional violation," Powell v. Alabama, 287 U.S. 45,53, 53 S.Ct. 55, 58, 77 L.Ed. 158 (1932). "A defendant with sufficient means should be afforded the opportunity to employ counsel of his own choice," Glasser v. United States, 315 U.S. 60, 62 S. Ct. 457, L.Ed. 680 (1942).

Petitioner exercised this right when he retained a private attorney from his home town of Melbourne, Florida. Petitioner hired Lane Vaughn to represent him throughout the entire trial in Roanoke and never at any such time employed the counsel of Sharit. Vaughn represented the Petitioner at the initial

arraignment on August 6, 1985, and upon motion was thereby granted permission to practice before the district court. Only Vaughn was permitted to practice before the court and not that of any co-counsel. [See A-29].

Petitioner secured affidavits from both attorneys subsequent to the appellate panel's opinion of October 1, 1987, to attest to the fiduciary relationships between themselves and the Petitioner. [See A-18 and A-25].

On the seventh day of trial, Petitioner's chosen counsel Vaughn failed to appear in court. The trial Court then instructed the Petitioner that the trial would continue without Vaughn and that Attorney Sharit would have to represent the Petitioner. A timely objectwas then raised by the Petitioner.

> THE COURT: Would this be a good time for you to get on the record--
>
> MR. SHARIT: Yes, your Honor.
>
> THE COURT: All right.
>
> MR. SHARIT: Your Honor, for the record I would like to note that Mr. Vaughn is no longer present and trying the case for Mr. Bell. He had to depart because

> of a serious illness in his family, which was that of his father having a major heart attack in the early morning hours of yesterday which was the 14th...Mr. Vaughn's father did have a major heart attack, a massive heart attack has been entailed and he is presently in critical condition and as such Mr. Vaughn is not sure what will occur and has had to go home to be with his father to see if he will survive the next 24 or 48 hours. I was, as the Court has indicated, requested and required to stay and finish the case for Mr. Vaughn. Mr. Bell is at this time indicating that he has a very strong objection to the case continuing without Mr. Vaughn and he's objecting to my trying the case. He's objecting to not having his chosen counsel try the case. At this time I would move for a severance on behalf of Mr. Bell.
>
> THE COURT: Well, the court is going to deny the motion,.....
> [TR. VOL. VII, pages 75-77]

This directive initiated by the trial judge was not harmonious with previous Supreme Court decisions. In Avery v. Alabama, 308 U. S. 444,446, 60 S.Ct. 321,322, 84 L.Ed. 377 (1940), Justice Black stated "the Constitution's guarantee of assistance of counsel cannot be satisfied by mere formal appointment." Likewise, this Court has also declared that "an unwanted counsel 'represents' the defendant

only through a tenous and unacceptable legal fiction. Unless the accused has acquiesced in such representation, the defense presented is not the defense guaranteed him by the Constitution, for, in a very real sense, it is not his defense," Faretta v. California, 422 U.S. 806,821, 95 S. Ct. 2525, 45 L.Ed.2d 562,573 (1975).

The unavailability of retained counsel in the middle of trial and the appointment of new counsel over the Petitioner's objection without the granting of a severance or a continuance so that said new counsel would have had sufficient time to prepare a defense in a complex conspiracy case requires reversal. A brief lunch recess was far too little time for Sharit to prepare himself for an effective presentation of any defense. Since the trial court gave "chosen counsel" Vaughn permission to abandon the Petitioner at mid-trial, at the very least it should have given the Petitioner an opportunity to secure another "chosen counsel."

"A defendant must be given a reasonable opportunity to employ and consult with counsel; otherwise, the right to be heard by counsel would be of little worth," Chandler v. Fretag, 348 U.S. 3,10, 75 S.Ct. 1,5, 99 L.Ed. 4 (1954); Crooker v. California, 357 U.S. 433,439, 78 S.Ct. 1287,1291, 2 L.Ed.2d 1448 (1958).

Petitioner was then forced to proceed with his defense (which consisted of merely resting) and with closing argument from an attorney not of his choosing. Obviously, it is impossible to determine what impact Vaughn's closing argument might have had upon the jury, but the fact that the Petitioner was not the beneficiary of such "chosen counsel's" closing argument is what created a constitutional violation. The attributes of an effective closing argument were summed up by this Court in Herring v. New York, 422 U.S. 853, 95 S.Ct. 2550, 45 L.Ed.2d 593,600 (1975):

> "There can be no doubt that closing argument for the defense is a basic element of the adversary fact finding process in a criminal trial." (at page 598, 45 L.Ed.2d)

"It can hardly be questioned that closing argument serves to sharpen and clarify the issues for resolution by the trier of fact in a criminal case. For it is only after all the evidence is in that counsel for the parties are in a position to present their respective versions of the case as a whole. Only then can they argue the inferences to be drawn from all the testimony, and point out the weaknesses of their adversaries' positions. And for the defense, closing argument is the last clear chance to persuade the trier of fact that there may be reasonable doubt of the defendant's guilt." (at page 600).

How could Sharit have effectively presented a closing argument when in fact he was not present during the direct testimony of the Government's chief witness against the Petitioner?

THE COURT: Let the record show that all thirteen (13) members of the jury are present, and---let's see, we've got one (1) vacant chair. Whose---

MR. VAUGHN: That's Mr. Sharit's. He's in the library, your Honor.
[TR. VOL. IV, page 1]

And again, upon conclusion of the trial;

MR. SHARIT: In response to that, your Honor, I want the record reflect that I was not present during the direct testimony, the entire direct testimony of George Muzevsky.

> THE COURT: Well, that I do not know. I know that you have come and gone from time to time. But I know Mr. Bell has had counsel sitting with him at all times during the trial and I indicated that when Mr. Vaughn asked me to leave I told him that I would leave it up to him that if---But that the trial had to go on and if he went home I was sure that his associate counsel could fill in and ably represent Mr. Bell.
> [TR. VOL. IX, page 47]

Why the trial court could not grant the Petitioner a continuance or severance upon Vaughn's sudden departure is of a most puzzling and perplexed nature. As previously noted in the Statement of Facts, Judge Turk declared a two day recess and continuance on the second day of trial due to Vaughn's illness. Before the Court came to this decision, Judge Turk was inquisitive as to whether the trial could continue without attorney Vaughn.

> THE COURT: All right. The Court is open to suggestions as to what we should do. If Mr. Bell has no objection to your representing him we can continue with the case. If he does, then we'll have to think of something else I think.

MR. SHARIT: He does, your Honor, in light of my lack of experience in the Federal Court system.

[TR. VOL. II, pages 88-89]

Furthermore, before reaching a decision of a continuance, Judge Turk considered as to whether declaring a mistrial for the Petitioner since attorney Vaughn could not represent the Petitoner.

MR. SHARIT: For the record, your Honor, we might have an objection for the severance, in light of Mr. Vaughn's situation. I believe they're required---procedurually I don't know it it's possible to declare a mistrial as to one (1) defendant.

THE COURT: Well, I think we could because it would be at Mr. Bell's choosing because we're willing to go ahead and you're qualified to practice law, but Mr. Bell is insisting on an attorney who cannot be here and so I think we could declare a mistrial as to him. I'm concerned about, though, just a general mistrial of the double jeopardy problem as to the other defendants unless they all agreed to that, to the mistrial.

[TR. VOL. II, page 91]

Upon granting Vaughn's wish to depart the trial and abandoning the Petitioner, why did the tone of the Court change on the seventh

day of trial when Petitioner vehemently objected to continuing with the presence of "unchosen counsel" Sharit?

The Appellate panel felt that "because Bell suffered no prejudice as a result of Vaughn's departure, , the district court correctly denied Bell's motion for a new trial." [See A-11]. Their reasoning was;

> "The docket sheet shows that Bell had subpoenaed no witnesses, and he himself did not testify. Sharit's sole task therefore was to inquire briefly of the Government's last witness about certain telephone records and to sum up. The district court recognized that Sharit ably represented Bell in this assigned task, and, having read Sharit's summation, we agree."
>
> [See A-10]

This is purely conjecture upon the panel's behalf. If the panel had carefully examined the trial transcripts, it would reveal that Vaughn had sucessfully engaged all the witnesses produced by the Government and that specific defense exhibits were selectively introduced during the Government's case in order to establish the groundwork for the

Petitioner's defense. Only Vaughn was familiar with the complex association between the Government's witnesses and the Petitioner's exhibits, the testimony of in-court witnesses, and the existence of inculpatory and exculpatory evidence. To present Petitioner's complicated defense without the presence of Vaughn would have been an insurmountable task for Sharit to accomplish, especially considering the trial judge's denial for any continuance whatsoever at this point of the trial. Therefore, Petitioner was deprived of his "chosen counsels" expertise and prowess in the field of tactical defense strategy.

The Appellate panel's opinion is unharmonious with other decisions that have been rendered by other courts of appeals. Petitioner will briefly describe several cases in other circuits that parallel the case at bar and support Petitioner's cause for a new trial.

Of most significance in the District of Columbia Circuit is United States v. Mardian, 546 F.2d 973 (D.C. Cir. 1976). In Mardian,

the defendant was ultimately convicted along with his infamous co-defendants Haldeman, Erlichman and Mitchell. Mardian had retained the services of an attorney to represent him at trial. After two weeks had elasped of a three month old trial, Mardian made a second severance motion because his lead counsel had become unexpectedly ill and co-counsel informed the court that lead counsel would be unavailable for six weeks. The district court denied such motion and instructed co-counsel to represent Mardian. On appeal, the Appeals Court held that since co-counsel was not retained by the defendant and co-counsel was only an associate in lead counsel's firm, and since co-counsel had come at the decision of lead counsel and had only become acquainted with the defendant at the commencement of trial, the district court's failure to grant a motion for severance constituted an abuse of discretion.

Mardian is distinguishable on several grounds:

(1) The co-counsel for the defendant who remained after lead counsel was taken ill had not been personally retained by the defendant.

(2) The defendant stated in court that he had taken special care in selecting the attorney who became sick.

(3) The court recognized that the defendant bore no responsibility for his lead counsel's absence.

Petitioner has clearly satisfied the foregoing conditions and supports such contentions with affidavits that have been executed by both his former attorneys in this trial. Petitioner had exclusively retained only Vaughn to represent him at trial. Sharit was never retained by the Petitioner. [See A-18 and A-25].

Petitioner carefully selected Vaughn to represent him due to Vaughn's highly regarded reputation of a skilled criminal defense attorney. Of extreme importance that should be noted is the wide disparateness of criminal defense experience between Vaughn and Sharit. [See A-20 and A-27].

The Sixth Circuit has also widely endorsed protection of the Sixth Amendment. "The right to choose one's own counsel is an essential component of the Sixth Amendment because, were a defendant not provided the opportunities to select his own counsel at his own expense, substantial risk would arise and the basic trust between counsel and client, which is a cornerstone of the adversary system, would be undercut," Linton v. Perini, 656 F.2d 207,209 (6th Cir. 1981). The said right to have independent choice of retained counsel, however, must of course be balanced with the trial court's right to fair and just administration. Conversely, a court may not arbitrarily interfere with this right in the name of docket control.

In Wilson v. Mintzes, 761 F.2d 275 (6th Cir. 1985), the Sixth Circuit reiterated a previous Supreme Court ruling stating that the denial of an accused's right to counsel of his choice "may so offend our concept of the basic requirements of a fair hearing as to amount to

a denial of due process of law contrary to the Fourteenth Amendment," Glasser v. United States, 315 U.S. 60,70, 62 S.Ct. 457,464, 86 L.Ed. 680 (1942).

In Gandy v. Alabama, 569 F.2d 1318 (5th Cir. 1978), the retained defense counsel requested a continuance so that he could participate in a civil trial and stated that he would absent himself from the defendant's trial if a continuance was not granted. When the defense counsel's associate had to represent the defendant when retained lead counsel made good on his threat, and associate counsel was unprepared and unfamiliar with the case, the trial court's failure to grant a continuance or to assure retained defense counsels' presence constituted a denial of due process under the Sixth Amendment, and so the Fifth Circuit reversed the defendant's conviction.

In Releford v. United States, 288 F.2d 298 (9th Cir. 1961), the attorney retained by the defendant was hospitalized. Instead of granting a continuance for two weeks so that

either the retained attorney could represent the defendant at trial or the defendant could secure substitute counsel of his choice, the trial judge ordered another attorney to represent the defendant over the defendant's objections and in the face of the second attorney's reluctance. The Ninth Circuit reversed the defendant's conviction because the defendant had been deprived of the assistance of counsel of his own choice.

In United States v. Seale, 461 F.2d 345 (7th Cir. 1972), the Seventh Circuit held that forcing a defendant to proceed with unwanted counsel, when retained counsel was ill, was abuse of discretion. The Seale Court noted that the defendant should have been given a reasonable continuance to obtain the services of either his retained counsel or some other chosen substitute counsel.

In United States v. Tramunti, 513 F.2d 1087 (2nd Cir. 1975), the defendant's attorney died during the middle of trial. A new attorney was appointed the following day, over the def-

endant's objections, and the trial court denied new counsel's motion for a continuance of four days. The Second Circuit reversed the conviction on the grounds that the defendant was prejudiced by the inadequate amount of time the new counsel had to prepare a defense, particularly with the element of a complex multiple defendant drug conspiracy trial.

In United States v. Koblitz, 803 F.2d 1523 (11th Cir. 1986), a trial judge ordered attorneys, who were unable to proceed to trial in a criminal case due to a scheduling conflict created by another criminal case, to obtain substitute counsel for their clients. The Eleventh Circuit ruled this invalid, as the order unlawfully interfered with their client's Sixth Amendment right to retain counsel of their choice.

> Although a district court's interest in the management of a case and the control of its calendar is strong, that interest is not permissibly furthered by requiring an attorney to obtain substitue counsel for his client when the client has expressed a specific desire to retain his present counsel. (803 F.2d at 1529)

In fact, this Fourth Circuit Appeal Court panel disregarded and failed to consider previous cases that were reversed by their own circuit when the interval between employment of an attorney and the commencement of trial was one day or less. Twifford v. Peyton, 372 F.2d 670 (4th Cir. 1967); Martin v. Commonwealth of Virginia, 365 F.2d 549 (4th Cir. 1966); Jones v. Cunningham, 313 F.2d 347 (4th Cir.1963); and Stokes v. Peyton, 437 F.2d 131 (4th Cir.1970)

The cases that were cited by the Appellate panel in support of their opinion are in fact very dissimilar to the case at bar; United States v. McManaman, 653 F.2d 458,459-61 (10th Cir.1981) Lofton v. Procunier, 487 F.2d 434,435 (9th Cir. 1973); Giacalone v. Lucas, 445 F.2d 1238,1240-43 (6th Cir. 1971), cert. denied, 405 U.S.922 (1972); Rolon Marxuach v. United States, 398 F.2d 548,550-51 (1st Cir. 1968), cert denied, 393 U.S. 982 (1968). [See A-11 and A-12]. Petitioner believes that these cases are so far off point that they need not warrant any discussion at this time. However, a detailed

analysis of these cases was provided by the Petitioner in his Petition For Rehearing on pages 4-7. If this Court grants such writ of certiorari as Petitioner has requested, then this argument will be further explored in the Brief.

Lastly, of gross injustice inflicted upon this Petitioner was the blatant neglect of the Fourth Circuit panel to consider crucial affidavits contained in the Petition For Rehearing, of which were subsequently executed by the former attorneys <u>after</u> the panel's opinion was filed on October 1, 1987.

> In arriving at our decision on this petition for rehearing, we have considered the record on appeal from the district court but we have not considered material not a part of that record which was later filed with us. [See A-16].

The Appellate panel had assumed that Sharit was"co-counsel" for the Petitioner. Upon Vaughn's departure, co-counsel Sharit replaced "lead counsel" Vaughn and adequately represented the Petitioner for the remainder

of the trial. Obviously, the panel was not interested in becoming cognizant of the true facts and so ignored Petitioner's pleading.

If these relevant affidavits were considered, only then could the court realize the tenacious relationship between the Petitioner and his retained counsel Vaughn, and the fact that Petitioner did not retain Sharit for co-counsel. [See A-18 and A-25].

Petitioner contends that the trial judge should have:

(1) Granted Petitioner a severance;

(2) Granted a continuance until "chosen" counsel Vaughn could resume his role as lead counsel;

(3) Not have permitted Vaughn to leave until the trial was concluded;

(4) Granted a continuace to enable Petitioner the time to retain another "chosen" counsel

(5) Granted a continuance so Sharit could familiarize himself with the facts in relation to presenting Petitioner's defense

Petitioner has conclusively demonstrated that his right to choose the counsel to present his defense was unconstitutionally abridged.

Therefore, since a constitutional error was committed which violated the Petitioner's Sixth Amendment rights', this United States Supreme Court should grant a writ of certiorari to review the decision of the United States Court of Appeals for the Fourth Circuit.

ISSUE II

Petitioner would respectfully submit that the events occuring in New Orleans in June of 1983, of which resluted in his having been acquitted of a conspiracy to possess marijuana with intent to distribute, could not be re-submitted to the Roanoke jury for further consideration upon a similar charge of conspiracy based upon the doctrine of collateral estoppel as contained in the double jeopardy clause of the Fifth Amendment to the United States Constitutuion.

Petitioner specifically complains of evidence and events that were purposely introduced by the Government,(a direct transgression against the trial judge's instructions) that were derived from his previous trial in New Orlea

Petitioner had been indicted in June, 1983, on three counts:

(1) Conspiracy to import marijuana;

(2) Conspiracy to possess marijuana with intent to distribute;

(3) Possession of marijuana with intent to distribute.

Upon a deadlock of the jury, the first trial was declared a mistrial. The second trial resulted in the acquittal as to Counts I and II. The jury remained deadlocked as to Count III. This count was subsequently dismissed without prejudice by the district court judge on January 5, 1984.

The Appellate panel in their opinion concluded that:

> "Bell contends that the Government was collaterally estopped from asserting facts in the instant case that were decided against it in the New Orleans trial. However, that is not what the Government did. It proved only that Bell possessed marijuana in New Orleans, and it was on the charge of possession that the New Orleans jury deadlocked. There is a clear distinction between simply possessing marijuana with intent to distribute and conspiring with others to import and possess it with intent to distribute. Acquittal of Bell on the

> conspiracy counts therefore did not preclude the Government from subsequently proving the fact of possession. (Emphasis added) [See A-12].

This is precisely what the Petitioner now complains of: Bell was never found guilty of factually possessing any marijuana in New Orleans, yet the Government was allowed to prove that he did possess a quanity of marijuana. Therefore, evidence of a crime of which the Petitioner did not commit has again been relitigated before another jury.

The acquittal as to Counts I and II reflects the jury's finding that there was a reasonable doubt whether the Petitioner participated in the criminal venture. The fact that Count III of the indictment was dismissed after the acquittal on the remaining counts tends to infer that this issue was decided in the Petitioner's favor. Under the doctrine of collateral estoppel, the Government is thusly precluded from relitigating these same facts again at the trial in Roanoke.

A most notable Supreme Court decision concerning the issue of collateral estoppel was rendered in Ashe v. Swenson, 397 U.S. 436, 90 S.Ct. 1189, 25 L.Ed.2d 469 (1970). In Ashe, six weeks after being acquitted in a state trial for the robbery of one of six poker players, the defendant was tried for the robbery of another player and convicted. On certiorari, the Supreme Court reversed the convition. Justice Brennan wrote an opinion, with whom Justice Marshall and Justice Douglas concurred, whereby stating:

> The prosecution plainly organized its case for the second trial to provide the links missing in the chain of identification evidence that was offered at the first trial. (397 U.S. at 459).

The case at bar is very similar to Ashe as the prosecution attempted to provide the corroborating testimony of co-conspirators that Bell had partially paid for a kilo of cocaine with boxes of marijuana, boxes that were uniquely similar to the New Orleans box. At the trial in New Orleans, the Government

had no witnesses that could testify that they had received such a unique box of marijuana from the Petitioner. But at the Roanoke trial, the same identical box of marijuana that was used in the New Orleans trial was again introduced as "direct evidence" of the Roanoke conspiracy, thereby providing the Government with a second opportunity to convict the Petitioner for conspiracy to possess marijuana with intent to distribute with the same evidence.

Unlike the Fourth Circuit, the broad application of collateral estoppel in criminal cases is strictly favored in the Second, Third, Fifth, Sixth, Seventh, Eleventh, and First Circuits. These Courts have consistently held that collateral estoppel bars any evidentiary use of past criminal conduct for which a defendant has been acquitted.

Two prominent cases that were decided in the Second Circuit are United States v. Kramer, 289 F.2d 909 (2nd Cir. 1961), and United States v. Mespoulede, 597 F.2d 329 (2nd Cir. 1979).

In Kramer, the court held that acquittal

of substantive offenses arising from Post Office burglaries settled the issue that the defendant did not burglarize the Post Office. Therefore, admission of evidence of defendant's participation in burglaries in a subsequent prosecution for conspiracy and receiving stolen goods was error under collateral estoppel and the conviction was reversed.

In Mespoulede, the defendant was charged in a two count indictment with conspiracy to distribute cocaine and possession of cocaine with intent to distribute. The jury acquitted the defendant on the possession count, but failed to reach a verdict on the conspiracy count. On retrial, the trial court allowed the prosecution to introduce evidence that he had possessed cocaine, stating that the evidence of possession, when considered with other evidence, was probative of his participation in the conspiracy. The Second Circuit reversed the conviction, finding that collateral estoppel precluded the introduction of any evidence of possession, since the jury necessarily decide

the possession issue in his favor. The court's position was that it would place an unjust burden on a defendant to require him to relitigate the very issue a jury already decided in his favor, and the introduction of such evidence would subject the defendant to a second risk of conviction for his actions.

The Third Circuit held in United States v. Keller, 624 F.2d 1154 (3rd Cir. 1980), that the doctrine of collateral estoppel bars not only reprosecution, but also evidence of crimes of which defendants have been acquitted in prior prosecutions. In Keller, the defendant had been previously acquitted of participating in a drug transaction occurring subsequent to the end of the conspiracy period. The Third Circuit ruled that the government was collaterally estopped from using evidence of his participation in the latter transaction to rebut entrapment defense in the instant proceeding.

The most notable cases decided in the Fifth Circuit were: Wingate v. Wainright, 464 F.2d 209 (5th Cir. 1972); United States v. Lee, 622 F.2d 787 (5th Cir. 1980); United States v. Mock, 604 F.2d 341 (5th Cir. 1979); United States v. Nelson, 599 F.2d 714 (5th Cir. 1979); Johnson v. Estelle, 506 F. 2d 347 (5th Cir. 1975); United States v. Larkin, 605 F.2d 1360 (5th Cir. 1979); Yawn v. v. United States, 244 F.2d 235 (5th Cir. 1957) Blackburn v. Cross, 510 F.2d 1014 (5th Cir.197

In Wingate v. Wainright, the defendant had been tried and acquitted for two prior robberies. In a later prosecution for another robbery, the State, for the purpose of showin a "course of conduct", again offered evidence that the defendant had committed the prior robberies. The Fifth Circuit reversed the conviction, holding that:

> "We hold that under Ashe where the State in an otherwise proper prosecution seeks for any purpose to relitigate an issue which was determined in a prior prosecution of the same parties, then the evidence offered for such a relitigation must be excluded from trial and the State must be precluded from asserting

that the issue should be determined in any way inconsistent with the prior determination."

"It is fundamentally unfair and totally incongruous with our basic concepts of justice to permit the sovereign to offer proof that a defendant committed a specific crime which a jury of that sovereign has concluded he did not commit. Otherwise a person could never remove himself from the blight and suspicious aura which surrounds an accusation that he is guilty of a specific crime. (464 F.2d at 215).

In the case at bar, the Government introduced into "direct evidence" a box of marijuana that Petitioner was arrested for in New Orleans. The prosecution then elicited from a U. S. Customs agent the fact that Petitioner was subsequently arrested for conspiracy and possession of that same box of marijuana. This subjected the jury to accusations of another crime that Petitioner was exonerated from and thus created a suspicious doubt as to Petitioner's character in the minds of the jurors.

In United States v. Lee, supra, the Fifth Circuit held that collateral estoppel

may operate in two distinct ways. First, it may completely bar a subsequent prosecution where one of the facts necessarily determined in the former trial is an essential element to the conviction the government now seeks. Second, although the subsequent prosecution may proceed, collateral estoppel operates to bar the introduction or argumentation of certain facts necessarily established in a prior proceeding. In Lee, the defendant's acquittal of possession of marijuana in a prior trial and his acquittal on a racketeering charge in another prior trial did not determine matters of fact in his favor so as to collaterally estop the government from prosecuting him for conspiracy to distribute marijuana.

But the Petitioner's acquittal of the conspiracy to possess marijuana should have precluded the Government from introducing the "same evidence" again in the Roanoke trial which involved a conspiracy to possess marijuana.

If Petitioner had been indicted for posession of marijuana with intent to distribute, then possibly the doctrine of collateral estoppel might not be invokable.

In United States v. Mock, supra, the defendant had been previously acquitted of conspiracy to import marijuana. The Fifth Circuit held that the government was barred by the doctrine of collateral estoppel from arguing or trying to establish for purpose of defendant's prosecution for tax evasion or any other purpose, that the defendant was part of that conspiracy.

Of all the decisions rendered in the Fifth Circuit, the case that most closely parallels the case at bar is United States v. Nelson, supra. The defendant was previously acquitted on a charge of conspiracy to distribute cocaine and heroin, and a mistrial was declared as to the possession with intent to distribute cocaine and distribution of cocaine. The defendant then made a motion to dismiss the substantive counts. The Fifth Circuit

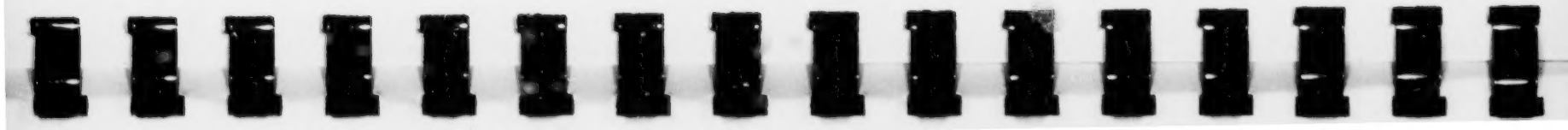
ruled that the doctrine of collateral estoppel prohibited the government from using evidence on a retrial, which if believed, would necessarily indicate participation in a conspiracy of which the government failed to prove in the first trial. However, the court also noted that collateral estoppel does not bar retrial on substantive charges and the government then indicated that it would retry the defendant as an aider and abettor on the substantive counts.

Essentially, the Fifth Circuit has strongly endorsed the proposition that a prior acquittal on a conspiracy collaterally estops the government from relying upon said conspiratorial events in subsequent conspiracy prosecutions.

The Sixth Circuit has also strongly endorsed the principle that collateral estoppel bars any evidentiary use of past criminal conduct for which a defendant has been acquitted. In United States v. Johnson,

697 F.2d 735 (6th Cir. 1983), the jury, in acquitting a defendant on a prior counterfeiting charge, had necessarily decided that the defendant had not committed specific acts. Certain evidence was then sought to be introduced on an intent issue in a subsequent counterfeiting prosecution. The Sixth Circuit held that collateral estoppel would bar any admission of the prior conduct evidence in any subsequent trial.

The Seventh Circuit has always held a great respect for the doctrine of collateral estoppel. In United States v. Castro, 629 F. 2d 456 (7th Cir. 1980), collateral estoppel operated to foreclose the government from introducing evidence in a second trial concerning defendant's membership in a conspiracy to distribute illegal drugs where combinations of persons in the first and second alleged conspiracies were encompassed by the same agreement. The court held that facts essential to the conspiracy conviction in the second trial were determined favorably by the jury



in its verdict of acquittal on the conspiracy count in the first trial. Therefore, the conviction was reversed by the Seventh Circuit.

In United States v. Magnus, 743 F.2d 517 (7th Cir. 1984), this circuit stated:

> "It is well settled that the doctrine of collateral estoppel applies to criminal prosecutions and prohibits the relitigation of issues decided in a defendant's favor by a final judgment. This doctrine clearly comes into play when a defendant has been tried and acquitted of one offense and then faces a new trial at which the government seeks to admit evidence showing the defendant's guilt on the acqitted offense." (743 F.2d at 524).

Finally, the Eleventh Circuit has feverently embraced that the principle of collateral estoppel prevents introduction, for any purpose, of prior similar acts of which a defendant has been acquitted.

In Albert v. Montgomery, 732 F.2d 865 (11th Cir. 1984), concerning the prosecution of a defendant on charges arising out of an assault upon a young man and woman, the court held that erroneous admission of evidence concerning a prior offense for which the de

defendant was tried and acquitted was prejudicial, particularly in light of the fact that the damaging testimony was compounded by use of the prior offense evidence during closing argument and in the jury instruction:

> "The trial court admitted extensive testimony and evidence concerning the Hatcher incident, over defense objections, for the purpose of showing "intent, motive, scheme and bent of mind of the defendant". Although Georgia law permits the introduction of evidence concerning prior similar acts, even those for which a defendant has been acquitted, as evidence of identitiy or motive,...it is clear that the Supreme Court and this Court have held that the principle of collateral estoppel prevents the introduction of such evidence for ANY purpose. (732 F.2d at 869).

A similar decision also caused the Eleventh Circuit to reverse a conviction in United States v. Gornto, 792 F.2d 1028 (11th Cir. 1986), whereby the doctrine of collateral estoppel barred the admission of a government's witnesses' testimony regarding the defendant's involvement in a drug transaction in the second trial on conspiracy counts, where the jury's acquittal of said defendant on substantive narcotics counts at the first trial indicated

disbelief of the witnessess' testimony.

Lastly, a case that also closely parallels the case at bar can be found in the First Circuit, United States v. Middleton, 673 F.2d 31 (1st Cir. 1982). In Middleton, a defendant was indicted in Florida on a Continuing Criminal Enterprise charge and then subsequently arrested and indicted in Maine on;

(1) conspiracy to possess marijuana with intent to distribute;

(2) possession of marijuana with intent to distribute.

In the first trial, in Florida, evidence was introduced about the seizure of marijuana in Maine in order to prove the C.C.E. count. At the close of the government's case, Middleton made a motion for dismissal, upon which the trial judge granted. This was the equivalent of an acquittal. Subsequently, the trial judge in Maine dismissed the Maine indictments since jeopardy had attached to the marijuana evidence. On appeal by the government, this circuit affirmed the lower

court's decision.

The Supreme Court has stated the proper analysis in determining whether the admission of prohibited evidence is merely 'harmless constitutional error' to be "whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction", Chapman v. California, 386 U.S. 18,23, 87 S.Ct. 824,827, 17 L.Ed.2d 705 (1967). Petitioner submits that the box of marijuana that was introduced as evidence in the Roanoke trial could not have been harmless error. This evidence was of such a prejudicial nature that it prominently figured in the jury's conviction of this Petitioner.

Furthermore, not only was this evidence prejudicial, but it was purposely introduced by the Government against the trial court's order not to discuss the New Orleans arrest.

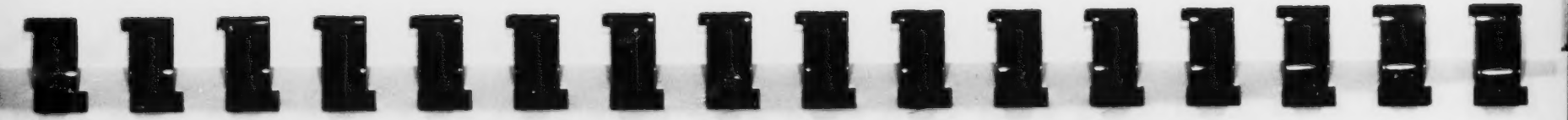
> THE COURT: Well, we are not going to talk about any---we're not going to talk about any trial in New Orleans or anything like this. Alright. (TR. VOL. III, page 238).

> THE COURT: Well, I'm going to---the court is going to rule that it can come in in furtherance of the conspiracy, that it's not 404(b), but we're not going into any trial or anything like that about it. Alright. (TR. VOL. III, page 241).

> THE COURT: Right. Right. I want it made clear, you know, to the U. S. Attorney that you're not to go in there and ask anything about an arrest, so tell the Agent before the---we're not going to talk about an arrest or any charge unless defense counsel brings it up. Alright. (TR. VOL. III, page 245).

Subsequent to these explicit instructions, the U. S. Customs agent promptly referred to Petitioner's arrest in New Orleans under the clever guidance of the U. S. Attorney. Chosen counsel Vaughn made a timely motion for a mistrial, upon which the trial judge overruled. (TR. VOL III, page 252).

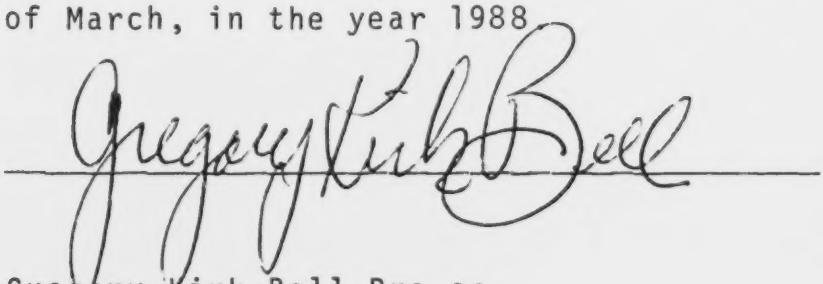
Therefore, since the Petitioner was previously acquitted of the conspiracy which the trial court ruled was direct evidence of the conspiracy charged herein, reversible error was committed in violation of the doctrine of collateral estoppel.



CONCLUSION

Based upon the foregoing cases, theories, citations, and reasons, the Petitioner, Gregory Kirk Bell, respectfully requests that a writ of certiorari be granted to review the judgment of the United States Court of Appeals for the Fourth Circuit.

Respectfully submitted, this 31st day of March, in the year 1988.



Gregory Kirk Bell-Pro se
01008-084
P. O. Box 600
Eglin A.F.B.
FL 32542-7606

IN THE

SUPREME COURT OF THE UNITED STATES

1988 TERM

GREGORY KIRK BELL,

PETITIONER,

V.

UNITED STATES OF AMERICA,

RESPONDENT

PROOF OF SERVICE

I, GREGORY KIRK BELL, PRO SE, after being duly sworn, hereby certify that a true copy of the foregoing PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT was deposited in the United States mail, first class postage prepaid, this 5th day of April, 1988, addressed to the following counsel for the Respondent, pursuant to the Rules of the Supreme Court, Rule 28.5(c).

Office of the United States Attorney
Assistant United States Attorney Karen Peters
P.O. Box 1709
Roanoke, Virginia
24008

Solicitor General
Department of Justice
Washington, D.C.
20530

GREGORY KIRK BELL-PRO SE

STATE OF FLORIDA
COUNTY OF OKALOOSA

Sworn to and subscribed before me this
23rd day of March, 1988.

NOTARY PUBLIC

MY COMMISSION EXPIRES:

NOTARY PUBLIC STATE OF FLORIDA
MY COMMISSION EXP. OCT. 6,1991
BONDED THRU GENERAL INS. UND.

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 86-5055

UNITED STATES OF AMERICA, Plaintiff-Appellee

V.

CORNELIUS JAMES RYAN, Defendant-Appellant

No. 86-5056

UNITED STATES OF AMERICA, Plaintiff-Appellee

V.

MICHAEL BECKER, Defendant-Appellant

No. 86-5079

UNITED STATES OF AMERICA, Plaintiff-Appellee

V.

JAMES E. STIVERS, Defendant-Appellant

No. 86-5090

UNITED STATES OF AMERICA, Plaintiff-Appellee

V.

GREGORY KIRK BELL, Defendant-Appellant

Appeal from the United States District Court for the Western District of Virginia, at Roanoke. James C. Turk, Chief District Court Judge. (CR-85-59)

Argued: May 7, 1987 Decided: October 1, 198

Before WIDENER and ERVIN, Circuit Judges, and VAN GRAAFEILAND, Senior Circuit Judge for the Second Circuit, sitting by designation.

Spencer D. Levine (Ronald A. Dion; Entin, Schwartz, Barbakoff & Schwartz; Michael Morchower; Elizabeth Dashiell; William Cleaveland on brief) for Appellants; Karen Breeding Peters, Assistant United States Attorney (John P. Alderman, United States Attorney on brief) for Appellee.

PER CURIAM:

On July 17, 1985, appellants, Cornelius Ryan, Michael Becker, James Stivers and Gregory Bell, and three others, George Ross, Elaine Mahan and Ralph Spencer, were indicted in the United States District Court for the Western District of Virginia, at Roanoke. They were charged in one count with conspiring with six unindicted persons, Rodrigo Posada, Alexander Dalton, George Nicholson, Jack Hoback, Charles Harlow and William Milleson, Jr., and others unnamed, to possess with intent to distribute and to distribute both cocaine and marijuana, 21 U.S.C. Section 841(a)(1), 846. Ryan, Becker, Stivers, Mahan and Spencer also were charged in other counts with interstate travel for the purpose of carrying on an unlawful drug enterprise, 18 U.S.C. Section 1952(a)(3). Ross and Spencer pled guilty. Following a jury trial before Chief Judge James Turk, appellants and Mahan were convicted of conspiracy to possess cocaine with intent to distribute. Appellant

Bell also was found guilty of conspiracy to possess marijuana with intent to distribute. Ryan, Becker, Stivers and Mahan were convicted on the Travel Act counts.

Viewed in the light most favorable to the Government, the evidence clearly establishes the existence of the drug conspiracy with which appellants were charged. The conspirators dealt principally with cocaine, most of which was smuggled into Florida by Posada, although Bell was an alternate Florida source when Posada was unavailable. Nicholson, Harlow and Milleson usually acted as first-tier middlemen in the distribution of he cocaine, and the remaining coconspirators generally were second-tier distributors. lthough Bell sold cocaine, he dealt principa / in marijuana. He both sold it to, and traded it for cocaine with, other members of the conspiracy. There is ample proof that appellants were members of the conspiracy. The proof on the Travel Act counts is equally convincing. Accordingly,

because we find no merit in the procedural and evidentiary arguments that appellants raise on appeal, we affirm.

Although appellants filed a joint brief and reply brief, only two arguments contained therein are common to the four parties.[1/] Their principal contention is that the proof established the existence of two separate conspiracies, one involving cocaine and the other marijuana. It is well settled, however, that a conspiracy may have diverse objectives, Braverman v. United States, 317 U.S. 49, 54, (1942), and this of course is true of drug conspiracies. Because drug traffickers may deal with more than one narcotic, it follows that conspiracies among traffickers may, as here, also involve more than one illegal substance. The Government was entitled to allege and prove the single multi-objective conspiracy that actually existed. See United States v. Alvarez, 735 F.2d 461, 465 (11th Cir. 1984);

1/ Appellant Bell was permitted to file a post-argument, pro se brief, which the Court has considered.

United States v. Barlin, 686 F.2d 81, 89, (2nd Cir. 1982). The district court carefully instructed the jurors that, in order to convict any defendant, the jurors had to find that the single conspiracy charged in the indictment existed and that the defendant was a member of that single conspiracy. See United States v. Cambindo Valencia, 609 F.2d 603, 625 (2nd Cir. 1979), cert. denied, 446 U.S. 940 (1980). Even if the jury erred in its finding of a single conspiracy, appellants would not be entitled to a new trial unless they could show that they were prejudiced. Berger v. United States, 295 U.S. 78, 82 (1935). The special verdicts which the district court secured precluded any such claim. The jury demonstrated through these verdicts that it was able to distinguish Bell's activities from those of his co-conspirators. The jury found that, while Bell trafficked in both cocaine and marijuana, Ryan, Becker and Stivers trafficked only in cocaine. Clearly, there

was no prejudicial spillover from Bell's conviction to those of his coconspirators.

In their second joint argument, appellants contend that the district court erred in instructing the jury that it must find that a conspiracy existed and that a defendant was a member of it before that defendant could be bound by the acts or statements of his alleged coconspirators. Appellants argue that this was "in total derogation of the trial court's legal obligation to determine the admissibility of coconspirator declaration evidence." (Appellants' Brief at 25). This argument demonstrates a misconception of the relative role of judge and jury in determining the binding effect of this otherwise-hearsay testimony. In order that a trial proceed with a reasonable degree of order and coherence, the court, applying a "fair preponderance of evidence" test, may admit statements of persons whom it believes will be found to be coconspirators. However, the ultimate determination as to the binding

effect of the admitted statements must of necessity rest with the jurors, to whom is assigned the task of making the predicate factual finding of coconspiracy beyond a reasonable doubt. We may conclude that the district judge made tacit determinations of admissibility in the instant case from the fact that he admitted the testimony. United States v. Scott, 730 F.2d 143, 148-49 (4th Cir.), cert. denied, 469 U.S. 1075 (1984).

Three of the arguments in the joint brief are primarily Bell's alone. Bell was represented in the trial by Attorney Lane Vaughn and his "co-counsel" Joseph Sharit. The case went to trial on Monday, January 6, 1986. The next morning, Vaughn told Judge Turk that he had to have a recess because he was ill and had to go see a doctor. The court took a short recess, following which Sharit reported that Vaughn had been admitted to the hospital and didn't know how long he would be there. The court then excused the jury until Thursday

morning. In the meantime, Judge Turk called the doctor, who informed him that there was nothing seriously wrong with Vaughn and that Vaughn had not been admitted to the hospital. The doctor also told Judge Turk that he knew of no reason why Vaughn could not be in court trying the case. Accordingly, the trial was resumed on Thursday.

However, on the following Tuesday, when the last Government witness was on the stand identifying telephone numbers, Vaughn told Judge Turk that Vaughn's father had had a heart attack and that Vaughn wanted to go home. Judge Turk told Vaughn that it was up to Vaughn and Bell to decide whether Vaughn should leave, but that the court was going ahead with the trial and that one of Bell's attorneys would have to be present. Vaughn left without even telling Judge Turk that he was going. The court then denied Sharit's motion to sever Bell's case, telling Sharit "It's obvious to the court that Mr. Vaughn

has tried to delay or sever this case from the very beginning."

The docket sheet shows that Bell had subpoenaed no witnesses, and he himself did not testify. Sharit's sole task therefore was to inquire briefly of the Government's last witness about certain telephone records and to sum up. The district court recognized that Sharit ably represented Bell in this assigned task, and, having read Sharit's summation, we agree. Nonetheless, Bell's appellate counsel contends that Bell's conviction must be reversed because he was deprived of counsel of his choice when Vaughn left. Although, as a general rule, a defendant who is deprived of the right to counsel of his choice need not show prejudice in order to be entitiled to a new trial, Flanagan v. United States, 465 U.S. 259, 268 (1984), the right to specific counsel is not absolute at all times and under all circumstatnces. Other factors may be considered and weighed in the

sound discretion of the trial court, including the status of the litigation, the convenience of the court and witnesses, the availability of other competent counsel, the complexity of the case, etc. Any other rule would create an automatic vehicle for a defendant to obtain a severance and delay of his trial merely by arranging for his "chosen" counsel to become ill or otherwise unavailable if the trial has not been going well. Counsel may absent himself and the defendant, as here, may then inform the court that he does not want to be represented by anyone else. Apparently this is what Judge Turk had in mind when, speaking of Vaughn, he said "Most attorneys do not act in this court like he has acted." Because Bell suffered no prejudice as a result of Vaughn's departure, the district court correctly denied Bell's motion for a new trial. See United States v. McManaman, 653 F.2d 458, 459-61 (10th Cir. 1981); Lofton v. Procunier, 487 F.2d 434, 435 (9th Cir. 1973); Giacalone v.

Lucas, 445 F.2d 1238, 1240-43 (6th Cir. 1971), cert. denied, 405 U.S. 922 (1972); Rolon Marxuach v. United States, 398 F.2d 548, 550-51 (1st Cir.) cert. denied, 393 U.S. 982 (1968).

Bell's second and third arguments are based on the admission of evidence that he had been in possession of marijuana in New Orleans, packaged in boxes that were uniquely similar to those he had delivered to coconspirators in the instant case. Bell was tried in New Orleans for possessing with intent to distribute 293 boxes of marijuana and for conspiring to import and possess with intent to distribute them. The jury acquitted him on the conspiracy count but deadlocked on the possession count. Bell contends that the Government was collaterally estopped from asserting facts in the instant case that were decided against it in the New Orleans trial. However, that is not what the Government did. It proved only that Bell possessed marijuana in New Orleans, and it was on the charge of possession that the New Orleans jury deadlocked. There is a clear

distinction between simply possessing marijuana with intent to distribute and conspiring with others to import and possess it with intent to distribute. Acquittal of Bell on the conspiracy counts therefore did not preclude the Government from subsequently proving the fact of possession.

Bell argues alternatively that, if the evidence was correctly admitted under Rule 404(b) of the Federal Rules of Evidence, the district court failed to charge the jury concerning the limited purpose for which it was admitted. This contention is specious. The district court correctly instructed the jury on this point on at least four occasions.

Equally without substance is appellant Becker's argument that because there is nothing in the record to indicate that he distributed the cocaine which he purchased from Nicholson, he was not a proven coconspirator. The suggestion that Becker purchased two kilos, or over $100,000 worth, of cocaine for his personal use borders on the ridiculous. Becker asked

Ross to introduce him to Nicholson so that Becker could be introduced to the cocaine business, and he paid Ross a $700 finder's fee for doing this. Moreover, Becker had the aid of an associate in handling his end of the business. Becker's participation in the ongoing conspiracy was substantially greater than the "slight connection" this Court holds to be sufficient. See United States v. Laughman, 618 F.2d 1067, 1076 (4th Cir.), cert. denied, 447 U.S. 925 (1980).

The final argument in appellants' brief, made on behalf of Stivers, barely merits comment. At the end of the charge, Stivers' counsel told Judge Turk that he had a request pertaining to the fact that Stivers had admitted using marijuana. The judge responded that he already had told the jurors that Stivers was not on trial for any offense not alleged in the indictment and that he didn't think he ought to mention it again "because it might just call their attention to it more." Counsel responded, "That's true, sir", and that ended

the discussion. It also disposes of Stivers' claim of reversible error.

The judgments of conviction are

AFFIRMED

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 86-5090

UNITED STATES OF AMERICA, Plaintiff-Appellee

V.

GREGORY KIRK BELL, Defendant-Appellant

O R D E R

It is ORDERED that the petition for rehearing en banc shall be, and it hereby is, filed although out of time.

In arriving at our decision on this petition for rehearing, we have considered the record on appeal from the district court but we have not considered material not a part of that record which was later filed with us.

There having been no request for a poll of the court on the petition for rehearing en

banc, it is accordingly ADJUDGED and ORDERED that the petition for rehearing en banc shall be, and it hereby is, denied.

The panel has considered the petition for rehearing and is of opinion it is without merit.

It is accordingly ADJUDGED and ORDERED that the petition for rehearing shall be, and it hereby is, denied.

With the concurrences of Judge Ervin and Judge Van Graafeiland.

/s/ H.E. Widener, Jr.

For the Court

FILED DECEMBER 29, 1987

A F F I D A V I T

O F

L A N E V A U G H N

I, LANE VAUGHN, after being duly sworn, hereby attest to the following facts and statements;

(1) Defendant Gregory Kirk Bell had personally retained me to represent him during the entire course of the proceedings, Case No. 85-00059, held in the United States District Court for the Western District of Virginia, at Roanoke, with the Honorable Judge James C. Turk presiding.

(2) I represented defendant Bell at his arraignment on August 6, 1985, held before Judge Turk in Roanoke, Virginia, and upon motion to the Court, I was permitted to practice before the Court in the above-styled case only.

(3) Prior to trial I requested the presence of an associate in my law firm, Joe. L. Sharit III, (who was employed by Vaughn, Vaughn, and Vaughn of Melbourne, FL) to assist me in any research work that I might encounter during the course of trial.

(4) Mr. Sharit was never personally retained as counsel for or by defendant Bell. In fact, Mr. Sharit was paid his normal weekly salary by our law firm while he was in trial at Roanoke, Virginia.

(5) During the trial between January 6, 1986, to January 17, 1986, I instructed Mr. Sharit

to conduct numerous legal research tasks in the Court's library. This was in preparation for a motion and memorandum to strike Rule 404(b) evidence, of which I subsequently submitted before the Court.

(6) During a critical part of the trial, Mr. Sharit was absent from the courtroom for the direct testimony of the Government's chief witness (George Muzevsky) against defendant Bell and also for the cross examination of another Government witness (Bill Milleson) who testified against defendant Bell.

(7) On Tuesday morning, January 14, 1986, I was informed that my father had suffered a major heart attack and requested Judge Turk's permission to leave the trial. This request was granted and therefore I departed Roanoke later that afternoon.

(8) Due to my absence, defendant Bell was deprived of my counsel, my advice on conducting a defense strategy, and my closing argument to the jury.

Lane Vaughn

LANE VAUGHN

STATE OF FLORIDA
COUNTY OF BREVARD

Sworn to and subscribed before me this 3rd day of December, 1987.

My Commission Expires: Carol Schihl
NOTARY PUBLIC

Notary Public, State of Florida
My Commission Expires Aug. 1, 1988
Bonded thru Troy Fain-Insurance, Inc.

NOTE: Original AFFIDAVIT filed in the Court Record, Docket Number 436129

VAUGHN, VAUGHN, VAUGHN, SILVERNAIL & CARY

ATTORNEYS AT LAW

MELBOURNE, FLORIDA 32901

W. G. Vaughn (1890-1951)

W. J. Vaughn
W. J. Vaughn, Jr.
Lane W. Vaughn
J. Preston Silvernail
Reed C. Cary

Mailing Address:

P.O. Box 370

Telephone:
305-723-8673

Offices:
2007-9 South
Melbourne Court

I have been a criminal lawyer by practice since November of 1982. During this time, I have tried by jury approximately twenty-five (25) trials, at least five (5) of those being in Federal Court. I am a member of the United States Court of Appeals for the Third, Fifth and Eleventh Circuits, the United States Supreme Court, as well as the Middle District of Florida and the Southern District of Texas. I am a member of the State Bar of Texas and Florida. I am also a member of the Association of Trial Lawyers of America, The Academy of Florida Trial Lawyers and The National Association of Criminal Defense Lawyers.

Lane W. Vaughn

Lane W. Vaughn

State of Florida
County of Brevard

I HEREBY CERTIFY that on this day, before me, an officer duly authorized in the State

aforesaid and in the County aforesaid to take acknowledgments, personally appeared LANE W. VAUGHN, individually and known to me to be the person described in and who executed the foregoing instrument and he acknowledged before me that he executed the same.

WITNESS my hand and official sealin the County and State last aforesaid this 3rd day of December A.D. 1987.

Carol Schihl

Notary Public

My Commission Expires:

Notary Public, State of Florida
My Commission Expires Aug. 1, 1988
Bonded Thru Troy Fain-Insurance, Inc.

NOTE: Original AFFIDAVIT filed in the Court Record, Docket Number 436129.

VAUGHN, VAUGHN, VUAGHN, SILVERNAIL & CARY

ATTORNEYS AT LAW

MELBOURNE, FLORIDA 32901

W. G. Vaughn (1890-1951)
W. J. Vaughn
W. J. Vaughn, Jr.
Lane W. Vaughn
J. Preston Silvernail
Reed C. Cary

Mailing Address:
P.O. Box 370

Telephone:
305-723-8673

Offices:
2007-9 South
Melbourne Court

A F F I D A V I T

I feel a reply is necessary to Judge Turk's comments stated in the record during my absence and which were made a part of the opinion of the United States Court of Appeals for the Fourth Circuit regarding Case No. 86-5055 on Page 6. [See A-8 & A-9]. I contacted some type of stomach flu that resulted in nausea as well as other symptoms. At Judge Turk's insistence, I reported to the emergency room at Roanoke Hospital for treatment. After the examination, the doctor told me he wanted to admit me for further evaluation, in Mr. Sharit's presence, and Mr. Sharit then proceeded to report that to

Judge Turk. Subsequently, the doctor decided to send me home with a prescription for medicatio I then left the hospital and went back to Judge Turk and personally informed him of the status of my condition. He had granted a two-day continuance based upon that.

After we resumed trial, I received a phone call that my father had suffered a major heart attack that had destroyed forty percent of his heart muscle and was diagnosed as having less than a fifty percent chance of survival. Judge Turk personally allowed me to leave when I told him I was leaving regardless of whether or not he gave me permission. This occured after he said either Mr. Sharit or I must remain. I felt this was possibly the last chance I would have to see my father alive. To suggest my father had a heart attack so this case could be severed or delayed is as ludicrous as Judge Turk's action throughout the entire trial, including his misrepresentation as to my discussion with the doctor at Roanoke Hospital.

Joe Sharit was never retained by Mr. Bell under any circumstances to represent him in any capacity. He did not participate in any pre-trial preparation, was absent during a majority of the trial itself, and totally lacked trial experience to handle a case the magnitude of this one. It is my understanding that Mr. Bell objected at all times to Mr. Sharit's representation of him.

Lane W. Vaughn

Lane W. Vaughn, Esquire
2013 South Melbourne Court
Melbourne, Florida 32901

State of Florida
County of Brevard

I HEREBY CERTIFY that on this day, before me, an officer duly authorized in the State aforesaid and in the County aforesaid to take acknowledgments, personally appeared LANE W. VAUGHN, individually and known to me to be the person described in and who executed the foregoing instrument and he acknowledged before me that he executed the same.

WITNESS my hand and official seal in the County and State last aforesaid this 3rd day of December A.D. 1987.

Carol Schihl

Notary Public

NOTE: Original Affidavit filed in the Court Record, Docket Number 436129.

A F F I D A V I T

O F

J O E L. S H A R I T, I I I

I, JOE L. SHARIT, III, after being duly sworn, hereby attest to the following facts and statements;

(1) During the criminal trial of Gregory Kirk Bell, Case No. 85-00059, held in the United States District Court for the Western District Of Virginia, at Roanoke, with the Honorable Judge James C. Turk presiding, I was employed by the law firm of Vaughn, Vaughn, Vaughn, Silvernail and Cary.

(2) I was never personally retained as counsel for or by the defendant, Gregory Bell, nor received any remuneration from Mr. Bell, prior to or during this trial.

(3) In fact, my presence was requested at the insistence of Mr. Lane W. Vaughn, defendant's retained counsel.

(4) During the course of the trial, Mr. Vaughn had requested my assistance by researching various case law in the Court's library regarding a Motion To Strike Rule 404(b) Evidence, which was subsequently submitted to and argued before the Court.

(5) Due to the fact of my absence from the trial while I was involved with research in the library, I was not present in the courtroom for the direct testimony of the Government's chief witness (George Muzevsky) against defendant Bell, nor for the cross examination of another Government witness (Bill Milleson), who also testified against defendant Bell.

Joe L. Sharit, III

Joe L. Sharit, III

State of Florida
County of Duval

Sworn to and subscribed before me this 7th day of December, 1987.

Mallory Newton

Notary Public

My Commission Expires:

Notary Public State of Florida
My Commission Exp. Oct. 26, 1991
Bonded thru General Ins. Und.

NOTE: Original AFFIDAVIT filed in the Court Record, Docket Number 436129.

A F F I D A V I T

O F

J O E L. S H A R I T, III

I, JOE L. SHARIT, III, after being duly sworn, hereby attest to the following facts and statements;

(1) prior to the trial of Gregory Kirk Bell on January 6, 1986, in Case No. 85-00059, held in the United States District Court for the Western District, at Roanoke, my Federal criminal trial experience consisted of the following:

Selecting a jury and arguing a Motion to Exclude Rule 404(b) evidence in the case of United States of America vs. Steven Howard Kern, in the United States District Court at Pittsburgh, Pennsylvania.

(2) Prior to the trial of Gregory Kirk Bell on January 6, 1986, my other criminal trial experience consisted of the following:

Prosecuting: Over twenty misdemeanor jury trials in State Court; over one hundred misdemeanor no-jury trials in State Court; over five felony jury trials in State Court.

Defending: No felony jury trials in State Court; approximately five felony non-jury trials in State Court; one misdemeanor jury trial in State Court.

Joe L. Sharit, III

Joe L. Sharit, III

State of Florida
County of Duval

Sworn to and subscribed before me this 7th day of December, 1987.

Mallory Newton

Notary Public

My Commission Expires:

Notary Public State of Florida
My Commission Exp. Oct. 26, 1991
Bonded thru General Ins. Und.

NOTE: Original AFFIDAVIT filed in the Court Record, Docket Number 436129.

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF VIRGINIA

ROANOKE DIVISION

UNITED STATES OF AMERICA

VS.

GREGORY KIRK BELL

CRIMINAL
DOCKET NO.
85-00059-R

ORDER

Upon motion of defense counsel and for good cause shown, it is hereby

ORDERED

that Lane Vaughn, Esquire be permitted to practice before this Court in the above styled case only.

James C. Turk

Chief United States
District Judge

FILED: August 6, 1985

Supreme Court, U.S.
FILED
JUN 2 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-1667

In the Supreme Court of the United States

OCTOBER TERM, 1987

GREGORY KIRK BELL, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

CHARLES FRIED
Solicitor General
JOHN C. KEENEY
Acting Assistant Attorney General
JOHN F. DE PUE
Attorney
Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTIONS PRESENTED

1. Whether petitioner was improperly denied representation by counsel of his choice.

2. Whether the doctrine of collateral estoppel precluded the government from introducing evidence concerning offenses that had been the subject of an earlier trial.

TABLE OF CONTENTS

	Page
Opinion below	1
Jurisdiction	1
Statement	1
Argument	6
Conclusion	15

TABLE OF AUTHORITIES

Cases:

Ashe v. *Swenson*, 397 U.S. 436 (1970) 13, 14
Chambers v. *Maroney*, 399 U.S. 42 (1970) 12
Gandy v. *Alabama*, 569 F.2d 1318 (5th Cir. 1978) 7, 8, 10
Giacalone v. *Lucas*, 445 F.2d 1238 (6th Cir. 1971), cert. denied, 405 U.S. 922 (1972) 8, 9
Government of the Virgin Islands v. *Harrigan*, 791 F.2d 34 (3d Cir. 1986) 13
Hess v. *Medlock*, 820 F.2d 1368 (4th Cir. 1987) 14
Linton v. *Perini*, 656 F.2d 207 (6th Cir. 1981), cert. denied, 454 U.S. 1162 (1982) 10
Morris v. *Slappy*, 461 U.S. 1 (1983) 8, 12
Releford v. *United States*, 288 F.2d 298 (9th Cir. 1961) ... 10, 11
Sampley v. *Attorney General*, 786 F.2d 610 (4th Cir.), cert. denied, 478 U.S. 1008 (1986) 8
Ungar v. *Sarafite*, 376 U.S. 575 (1964) 12
United States v. *Baugus*, 761 F.2d 506 (8th Cir. 1985) 14
United States v. *Boldin*, 818 F.2d 771 (11th Cir. 1987) ... 14
United States v. *Bosby*, 675 F.2d 1174 (11th Cir. 1982) ... 13
United States v. *Donsky*, 825 F.2d 746 (3d Cir. 1987) 13
United States v. *Gentile*, 816 F.2d 1157 (7th Cir. 1987) ... 14
United States v. *Jackson*, 778 F.2d 933 (2d Cir. 1985), cert. denied, No. 86-5098 (Oct. 14, 1986). 14
United States v. *Kalish*, 780 F.2d 506 (5th Cir.), cert. denied, 476 U.S. 1118 (1986) 14
United States v. *Koblitz*, 803 F.2d 1523 (11th Cir. 1986) .. 10
United States v. *Mardian*, 546 F.2d 973 (D.C. Cir. 1976) . 9
United States v. *Medina*, 709 F.2d 155 (2d Cir. 1983) 14

Cases—Continued: Page

United States v. *Mitchell*, 777 F.2d 248 (5th Cir. 1985), cert. denied, 475 U.S. 1096 (1986) 7, 8
United States v. *Nelson*, 599 F.2d 714 (5th Cir. 1979) 14
United States v. *Salinas*, 701 F.2d 41 (5th Cir. 1983) 13
United States v. *Seale*, 461 F.2d 345 (7th Cir. 1972) 11
United States v. *Tramunti*, 513 F.2d 1087 (2d Cir.), cert. denied, 423 U.S. 832 (1975) 11, 12
Wheat v. *United States*, No. 87-4 (May 23, 1988) 7
Wilson v. *Mintzes*, 761 F.2d 275 (6th Cir. 1985) 7, 8, 11

Constitution, statutes and rule:

U.S. Const. Amend. VI 7
18 U.S.C. 1952(a)(3) 2
21 U.S.C. 846 2
Fed. R. App. P. 10(a) 13

In the Supreme Court of the United States

OCTOBER TERM, 1987

No. 87-1667

GREGORY KIRK BELL, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A15) is reported at 831 F.2d 292 (Table).

JURISDICTION

The judgment of the court of appeals was entered on October 1, 1987. A petition for rehearing was denied on December 29, 1987 (Pet. App. A16-A17). The petition for a writ of certiorari was filed on February 29, 1988, and is therefore out of time under Rules 20.1 and 29.1 of the Rules of this Court. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Western District of Virginia, petitioner was convicted together with co-defendants Cornelius James Ryan,

Michael Becker, and James E. Stivers of conspiracy to possess cocaine with intent to distribute it and conspiracy to distribute cocaine, in violation of 21 U.S.C. 846. Petitioner was also convicted of conspiracy to possess marijuana with intent to distribute it, in violation of 21 U.S.C. 846.[1] Pet. App. A3-A4. He was sentenced to nine years' imprisonment and to fines totaling $15,000. The court of appeals affirmed (*id.* at A1-A15).

1. The government's evidence at trial is summarized in the opinion of the court of appeals (Pet. App. A4). It showed that petitioner was a participant in a scheme to smuggle cocaine and other controlled substances into Florida. Petitioner served as a source of cocaine when Rodrigo Poseda, an unindicted co-conspirator, was unavailable, but petitioner dealt principally in marijuana, selling it to other members of the conspiracy or trading it to them in exchange for cocaine.

At trial, petitioner was represented by Lane Vaughn, who was assisted by an associate, Joseph Sharit. On Tuesday, January 7, 1986, the day after the trial began, Vaughn informed the trial judge that he was ill and had to see a doctor. After a short recess, Sharit informed the court that Vaughn had been admitted to the hospital and was uncertain how long he would be required to remain there. The trial judge then telephoned Vaughn's doctor, who informed him that Vaughn had not been admitted to the hospital and that there was no reason why Vaughn could not continue participating in the trial. Accordingly, trial resumed on Thursday, January 8, 1986, with Vaughn acting as petitioner's lead counsel. Pet. App. A8-A9.

---

[1] Co-defendants Ryan, Becker, and Stivers were also convicted of interstate travel for the purpose of conducting an unlawful drug enterprise, in violation of 18 U.S.C. 1952(a)(3). They were each sentenced to three-year terms of imprisonment.

On January 14, when the last government witness was on the stand, Vaughn informed the trial judge that his father had had a heart attack and that he wished to go home. The trial judge responded that it was up to petitioner and Vaughn to determine whether Vaughn should leave, but that, in any event, the trial would continue and that one of petitioner's attorneys would have to be present. When the trial resumed, Sharit informed the court that Vaughn had left to be with his father and that Sharit was uncertain what would ensue. Sharit also stated that petitioner objected to proceeding in Vaughn's absence and objected to Sharit's representation. Accordingly, he moved for a severance of petitioner's case from that of the co-defendants. 7 Tr. 75-77.

The trial judge denied the severance motion. In ruling, he commented that "Mr. Vaughn * * * left without even telling the court he was leaving[;] * * * he didn't even have the courtesy to tell the court that he was going." The trial judge also stated (C.A. App. 119-120):

> [W]e're going ahead with the case and [petitioner] knows this and Mr. Vaughn knows this. I know nothing about the condition of Mr. Vaughn's father. I had been told that it was not as serious as it was displayed yesterday, but that I do not know. And I'm just as sorry as I can be, * * * but it's obvious to the court that Mr. Vaughn has tried to delay or sever this case from the very beginning and I have told Mr. Vaughn that. I have told Mr. Vaughn that * * * most attorneys do not act in this court like he has acted.

Because petitioner had subpoenaed no witnesses and did not testify, Sharit's responsibility consisted of cross-examining the government's last witness concerning some telephone records and presenting summation (Pet. App. A9-A10). Petitioner subsequently moved for a new trial,

claiming that he had been denied the right to representation by counsel of his choice. The trial judge denied the motion.

2. Before his trial in this case, petitioner had been tried twice in the Eastern District of Louisiana on a charge of possessing 293 boxes of marijuana with intent to distribute the substance and charges of conspiring to import and to possess marijuana with intent to distribute it. A mistrial was declared during the first trial when the jury was unable to reach a verdict on any of the charges. At a retrial, the jury acquitted petitioner on the conspiracy counts but once again failed to reach a verdict on the possession count. The possession count was later dismissed without prejudice on the government's motion (Pet. App. A12).

In this case, the government introduced, over petitioner's objection, evidence that in New Orleans he had been in possession of uniquely packaged boxes of marijuana. Similar evidence had been admitted during the trials on the conspiracy and possession counts in the Eastern District of Louisiana.

3. On appeal, petitioner argued that he had been denied the right to representation by counsel of his choice. The court of appeals rejected that claim. The court reasoned that the right to specific counsel is not absolute and that the decision whether to proceed with a trial in the absence of counsel of the defendant's choice can be based on a balancing of several factors. Those factors include the status of the litigation, the convenience of the court and witnesses, the availability of other competent counsel, and the complexity of the case. The court of appeals noted that any other rule would enable a defendant to obtain a severance and a delay of his trial merely by arranging for his chosen counsel to become ill or unavailable and then informing the court that he did not wish to be represented

by anyone else. Because the trial judge believed that that was what occurred here, and because the court of appeals concluded that petitioner suffered no prejudice as the result of the substitution of Sharit for Vaughn at the conclusion of the government's case,[2] the court of appeals held that the trial court's decision to proceed despite Vaughn's absence was not an abuse of discretion. Pet. App. A10-A11.

Petitioner also claimed that the government was collaterally estopped from introducing the marijuana packages that were similar to those introduced during the trial in the Eastern District of Louisiana, because that trial had resulted in acquittals on the conspiracy counts. The court of appeals rejected that claim, reasoning that the acquittals on the conspiracy counts did not preclude the government from subsequently proving that petitioner possessed the package. Pet. App. A12-A13.[3]

Petitioner then filed a petition for rehearing and attached to it affidavits from both Vaughn and Sharit. Vaughn's affidavits averred that he had been retained as

---

[2] The court of appeals observed: "The district court recognized that Sharit ably represented Bell in [cross-examining the last government witness and in summation], and, having read Sharit's summation, we agree" (Pet. App. A10).

[3] The court of appeals also rejected petitioner's claim that, even if the evidence of petitioner's possession of marijuana in New Orleans was properly admitted, the trial judge erred by failing to instruct the jury concerning the limited purposes for which that evidence could be considered (Pet. App. A13). Additionally, the court of appeals rejected claims by petitioner and his co-defendants that the government proved two separate conspiracies rather than the single conspiracy alleged in the indictment (*id.* at A5), and that, for purposes of considering the statements of alleged co-conspirators against one another, the court improperly left to the jury the determination whether a conspiracy existed and whether the defendants were participants in it (*id.* at A7).

counsel by petitioner and that Sharit, an associate in his law firm, had merely been designated to assist with legal research during the trial. As a result, Sharit did not participate in pretrial preparation and was absent from the courtroom during the testimony of several government witnesses (Pet. App. A18-A19). Vaughn also stated that on Tuesday, January 7, 1986, he was suffering from a stomach disorder and, at the trial judge's insistence, reported to a hospital emergency room where he was admitted for evaluation. After a two-day continuance to permit his recovery, he learned that his father had suffered a heart attack, and he left the trial after informing the trial judge that he was leaving regardless of whether the court gave its consent. Sharit's affidavits stated that he had not been personally retained by petitioner, that his trial experience consisted principally of prosecutions in state court rather than defense work and that he had been conducting legal research outside the courtroom during the testimony of certain government witnesses (*id.* at A25-A28).

In denying the petition for rehearing, the court of appeals noted that "[i]n arriving at [its] decision * * * [it] ha[d] considered the record on appeal from the district court but [that it] ha[d] not considered material not a part of that record which was later filed with us" (Pet. App. A16).

ARGUMENT

1. Petitioner contends (Pet. 11-31) that the trial court erred by requiring his case to proceed in the absence of his chosen counsel. More specifically, he maintains that the trial judge abused his discretion by failing to grant petitioner a severance or a continuance until Vaughn was again available to represent him.

a. As this Court recently reaffirmed, "while the right to select and be represented by one's preferred attorney is comprehended by the Sixth Amendment, the essential aim of the Amendment is to guarantee an effective advocate for each criminal defendant rather than to ensure that a defendant will inexorably be represented by the lawyer whom he prefers." *Wheat* v. *United States,* No. 87-4 (May 23, 1988), slip op. 6. Thus, although an accused's right to counsel of his choice is a component of the Sixth Amendment, the right is not absolute. See, *e.g., Wilson* v. *Mintzes,* 761 F.2d 275, 280 (6th Cir. 1985). As the court explained in *United States* v. *Mitchell,* 777 F.2d 248, 256 (5th Cir. 1985) (quoting *Gandy* v. *Alabama,* 569 F.2d 1318, 1323 (5th Cir. 1978)), cert. denied, 475 U.S. 1096 (1986):

> [T]he right to counsel of one's choice is not absolute as is the right to the assistance of counsel. The right to choose counsel may not be subverted to obstruct the orderly procedure in the courts or to interfere with the fair administration of justice. It is a right and a proper tool of the defendant, it cannot be used merely as a manipulative monkey wrench. A defendant cannot assume that the right to choose counsel affords "the right to obtain a delay at his whim and caprice, or to obtain a reversal because he was unable to frustrate justice." Rather, the proper exercise of the trial court's discretion requires a delicate balance between the defendant's due process right to adequate representation by counsel of his choice and the general interest in the prompt and efficient administration of justice.

Because of the "fact-specific conflicts between individual rights and state interests" posed by requests for continuances to permit representation by counsel of choice, "trial courts must be accorded wide discretion [in

passing on such requests] notwithstanding that constitutional rights may be implicated." *Sampley* v. *Attorney General,* 786 F.2d 610, 613 (4th Cir.), cert. denied, 478 U.S. 1008 (1986). The courts of appeals have adopted a multi-factor balancing analysis for determining whether that discretion is reasonably exercised. Pertinent considerations include "the length of the delay [anticipated]; whether the lead counsel has associates prepared to try the case in his absence; whether other continuances have been requested and received; the convenience or inconvenience to litigants, witnesses, opposing counsel, and the court; whether the delay seems to be for legitimate reasons, or whether it is purposeful and dilatory; and other relevant factors [including whether the defendant is competently and properly represented by surrogate counsel]." *Giacalone* v. *Lucas,* 445 F.2d 1238, 1240, 1243 (6th Cir. 1971), cert. denied, 405 U.S. 922 (1972); see also *United States* v. *Mitchell,* 777 F.2d at 257; *Wilson* v. *Mintzes,* 761 F.2d at 281; *Gandy* v. *Alabama,* 569 F.2d at 1324.

The trial judge's refusal to delay the trial in this case did not constitute an " 'unreasoning and arbitrary "insistence upon expeditiousness in the face of a justifiable request for delay." ' " *Sampley* v. *Attorney General,* 786 F.2d at 613 (quoting *Morris* v. *Slappy,* 461 U.S. 1, 11-12 (1983)). In the first place, because Vaughn had earlier obtained a continuance by claiming medical problems that proved to be unsubstantiated, the trial judge viewed Vaughn's claim that he had to leave to attend his ailing father with understandable skepticism. The judge observed that "Vaughn ha[d] tried to delay or sever this case from the very beginning" (Pet. App. A9-A10) and that "[m]ost attorneys do not act in this court like he has acted" (*id.* at A11). Second, when Vaughn absented himself from the trial, he did not advise the trial judge concerning the likely duration of the absence. It was therefore uncertain how

long a delay would be necessary to accommodate Vaughn's personal needs. Third, on Vaughn's departure, an associate, who had earlier participated in petitioner's defense, was available to assume Vaughn's duties. Fourth, Vaughn's absence occurred at the conclusion of the government's case. Thus, a severance for the purpose of obtaining additional time would have required a repetition of almost the entire trial before a different jury and would have resulted in substantial inconvenience to the court, the government, and the witnesses. Cf. *United States* v. *Mardian,* 546 F.2d 973, 980-981 (D.C. Cir. 1976) (failure to grant severance when defendant's counsel was taken ill held an abuse of discretion because only a small part of the trial had elapsed and severance would not have caused undue disruption). Finally, because of the timing of Vaughn's departure, petitioner was represented by Vaughn throughout almost the entire trial; Sharit's role was limited to cross-examining the government's final witness concerning telephone records and making a summation. And, because petitioner had not subpoenaed any witnesses to testify on his own behalf, it did not appear that Sharit would be required to present a defense case. After fully reviewing the record, both courts below found that Sharit ably represented petitioner in fulfilling these responsibilities. Petitioner therefore was not prejudiced by the trial court's failure to postpone the proceedings pending Vaughn's return. See *Giacalone* v. *Lucas,* 445 F.2d at 1243 (noting that defendant was properly and competently represented by substitute counsel).

The authorities cited by petitioner in support of his claim that the trial judge should have delayed the trial pending the return of Vaughn are all distinguishable on their facts. Many of those cases involved pretrial requests for continuances. In those cases, the trial courts had not invested substantial resources in jury selection and the

presentation of evidence. For example, in *Gandy* v. *Alabama,* 569 F.2d 1318 (5th Cir. 1978), the motion for a continuance was made before trial, and "the trial court did not investigate or consider reasonable alternatives to the simple denial of the motion" (*id.* at 1328 (footnote omitted)). Moreover, the case involved "a retained lawyer's abandonment of his client and a trial court's insensitive acquiescence in the desertion despite practical alternatives" (*id.* at 1327-1328), factors that according to the court of appeals made that case "unique" (*id.* at 1327). *Linton* v. *Perini,* 656 F.2d 207 (6th Cir. 1981), cert. denied, 454 U.S. 1162 (1982), likewise involved a pretrial request for a continuance. In holding that the trial judge should have granted the request, the court of appeals observed that "[d]efendant's retained counsel had not received any prior continuances and nothing in the record indicates that the requested continuance involved a scheme to delay the trial. There was no showing of inconvenience to the witnesses, opposing counsel, or the court" (*id.* at 212).

In *United States* v. *Koblitz,* 803 F.2d 1523 (11th Cir. 1986), it became clear before trial that the defendants' previously retained counsel would be unable to appear on the scheduled trial date because they were occupied with another lengthy trial. The court of appeals held that the trial court properly *denied* a continuance despite the defendants' insistence that they would go to trial only with those attorneys (*id.* at 1528). The court found error only in the trial judge's requirement that the defendants' trial counsel be responsible for obtaining substitutes rather than permitting the defendants to select new counsel of their choice. In *Releford* v. *United States,* 288 F.2d 298 (9th Cir. 1961), when the defendant's retained counsel was hospitalized before trial, the trial judge refused to grant a requested two-week continuance. Instead, the court

directed an attorney who shared offices with retained counsel to represent the defendant. Because that attorney "only shared offices with [retained counsel], * * * did not willingly serve as Releford's counsel[,] * * * was not appointed by the court as Releford's attorney[,] * * * [and] was not chosen by Releford" (*id.* at 302), the court of appeals held that the trial court should not have required Releford to proceed to trial represented by that attorney. None of these cases stands for the proposition that a court must grant a midtrial continuance, at great inconvenience to the affected participants, when it has available the alternative of allowing the trial to proceed with the defendant represented by a competent lawyer who has already participated in his defense.

Other cases on which petitioner relies are even more clearly inapposite. In *United States* v. *Seale,* 461 F.2d 345 (7th Cir. 1972), the court of appeals found error in the trial court's refusal even to *inquire* into the basis for the defendant's dissatisfaction with counsel (*id.* at 356-361). The court of appeals did not hold that, if it had made appropriate inquiries, the trial court would have lacked the authority to require the defendant to proceed with a lawyer who was not the defendant's preferred counsel (see *id.* at 361 n.29).

Wilson v. *Mintzes,* 761 F.2d 275 (6th Cir. 1985), involved the situation, entirely different from this case, in which a midtrial confrontation between the trial court and defense counsel led the defendant to express dissatisfaction with his representation and defense counsel to refuse to participate further in the trial. The court of appeals held that the trial court acted unreasonably in failing to heed the defendant's expressions of dissatisfaction (*id.* at 282).

Finally, in *United States* v. *Tramunti,* 513 F.2d 1087 (2d Cir.), cert. denied, 423 U.S. 832 (1975), a defendant's attorney in a multi-defendant trial died while trial was in

progress. The trial judge denied new counsel a continuance to familiarize himself with the case. The court of appeals held that the denial constituted an abuse of discretion, noting that there was no evidence that the request constituted a bad-faith attempt to delay the trial and that a delay of only two days would have resulted if the continuance had been granted (*id.* at 1116-1117). In this case, by contrast, the trial court suspected that the defendant was engaging in dilatory tactics, and the duration of any possible delay was uncertain.

b. In addition, petitioner claims (Pet. 16) that, even if the trial court's midtrial substitution of Sharit for Vaughn was proper, the judge abused his discretion in not granting Sharit a delay to permit adequate preparation. As this Court explained in *Morris* v. *Slappy*, 461 U.S. at 11-12 (quoting *Ungar* v. *Sarafite*, 376 U.S. 575, 589 (1964)), however, "[t]rial judges necessarily require a great deal of latitude in scheduling trials. * * * Consequently, broad discretion must be granted trial courts on matters of continuances; only an unreasoning and arbitrary 'insistance upon expeditiousness in the face of a justifiable request for delay' violates the right to the assistance of counsel."

The trial judge did not abuse that broad discretion in this case. Sharit had previously assisted in petitioner's defense and therefore could reasonably be expected to be conversant with the case. As the court below recognized (Pet. App. A10-A11), Sharit was not required to assume the role of lead counsel until the case had almost been concluded, and he ably represented petitioner throughout the final phases of the trial. Accordingly, denial of the requested delay did not adversely affect the adequacy of Sharit's representation or otherwise prejudice petitioner. See *Chambers* v. *Maroney*, 399 U.S. 42, 53-54 (1970).

c. Petitioner further maintains (Pet. 30-31) that, in denying his petition for rehearing, the court below

improperly failed to consider averments contained in the attached affidavits of Vaughn and Sharit. But "[i]t is elementary that [a] court cannot consider any material that is not a part of the record." *United States* v. *Donsky,* 825 F.2d 746, 749 (3d Cir. 1987); see, *e.g., Government of the Virgin Islands* v. *Harrigan,* 791 F.2d 34, 36 (3d Cir. 1986); *United States* v. *Bosby,* 675 F.2d 1174, 1181 n.9 (11th Cir. 1982); Fed. R. App. P. 10(a). That principle plainly applies to materials such as affidavits submitted by a party for the first time in a petition for rehearing, because such materials are "not properly a part of the record on appeal." *United States* v. *Salinas,* 701 F.2d 41, 41 (5th Cir. 1983). The court of appeals therefore acted properly in refusing to consider the affidavits.

2. Petitioner also claims (Pet. 32-49) that the introduction of the packaged marijuana that he was alleged to have possessed in New Orleans violated the doctrine of collateral estoppel. More specifically, he maintains that his acquittal of conspiracy to import marijuana and his acquittal of conspiracy to possess marijuana with intent to distribute it preclude relitigation of factual matters relating to possession of the same marijuana. This argument, however, fundamentally misperceives the scope of the doctrine of collateral estoppel.

As the Court explained in *Ashe* v. *Swenson,* 397 U.S. 436, 443 (1970), collateral estoppel "means simply that when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit." In determining whether collateral estoppel applies, the court must " 'examine the record of a prior proceeding, taking into account the pleadings, evidence, charge, and other relevant matter, and conclude whether a rational jury could have grounded its verdict upon an issue other than that which the defendant seeks to foreclose from con-

sideration' " (*id.* at 444 (footnote and citation omitted)). And the burden is on the defendant to show that the jury's verdict in the prior trial *necessarily* decided the issue raised in the second prosecution. See, *e.g.*, *Hess* v. *Medlock*, 820 F.2d 1368, 1373 (4th Cir. 1987); *United States* v. *Boldin*, 818 F.2d 771, 775 (11th Cir. 1987); *United States* v. *Gentile*, 816 F.2d 1157, 1162 (7th Cir. 1987); *United States* v. *Baugus*, 761 F.2d 506, 508 (8th Cir. 1985); *United States* v. *Medina*, 709 F.2d 155, 156 & n.** (2d Cir. 1983).

Under these principles, petitioner's acquittal on the conspiracy counts did not collaterally estop the government from showing in this case that petitioner had possessed the same marijuana in New Orleans. In acquitting petitioner on the conspiracy counts, the jury may simply not have been convinced beyond a reasonable doubt that he was a participant in concerted rather than unilateral criminal activity. If the jury had been convinced that there was a reasonable doubt whether petitioner had possessed marijuana with intent to distribute it, it would have returned an acquittal on that charge as well, but it did not. Accordingly, the conspiracy acquittals did not foreclose relitigation of the question whether petitioner possessed the marijuana at issue. See *United States* v. *Jackson*, 778 F.2d 933, 940 (2d Cir. 1985) ("[t]here can * * * be no general principle that, after acquittal on a conspiracy count, the Government may not retry a defendant on a related substantive count"), cert. denied, No. 86-5098 (Oct. 14, 1986); accord *United States* v. *Kalish*, 780 F.2d 506, 509 (5th Cir.), cert. denied, 476 U.S. 1118 (1986); *United States* v. *Nelson*, 599 F.2d 714, 717 (5th Cir. 1979) (because acquittal on drug conspiracy count could have been premised on element of agreement, verdict not preclusive as to facts essential to proof of substantive possession count).[4]

---

[4] The authorities cited by petitioner (Pet. 36-46) are not to the contrary. None of the cases holds that an acquittal on a conspiracy charge

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfuily submitted.

CHARLES FRIED
Solicitor General
JOHN C. KEENEY
Acting Assistant Attorney General
JOHN F. DE PUE
Attorney

JUNE 1988

---

can collaterally estop the government from showing that the defendant committed *substantive* offenses on which the first jury did not return a verdict of acquittal.

U.S. GOVERNMENT PRINTING OFFICE 1988 – 202-037/60484

Supreme Court, U.S.
FILED
JUN 22 1988
JOSEPH F. SPANIOL, JR.
CLERK

NO. 87-1667

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

GREGORY KIRK BELL,

PETITIONER

V.

UNITED STATES OF AMERICA,

RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

GREGORY KIRK BELL-PRO SE
01008-084
P.O. BOX 600
EGLIN A.F.B.
FLORIDA
32542-7606

NO. 87-1667

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

GREGORY KIRK BELL,

PETITIONER

V.

UNITED STATES OF AMERICA,

RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

GREGORY KIRK BELL-PRO SE
01008-084
P.O. BOX 600
EGLIN A.F.B.
FLORIDA
32542-7606

TABLE OF CONTENTS

TABLE OF AUTHORITIES . . . . . .i,ii

ARGUMENT ISSUE I 1

ARGUMENT ISSUE II 20

PROOF OF SERVICE 21

TABLE OF AUTHORITIES

Beck v. Ohio
379 U.S. 89 (1964). 3

Chandler v. Fretag
348 U.S. 3, 9 (1954) 5

Gandy v. Alabama
569 F.2d 1318 (5th Cir. 1978) 18

Giacalone v. Lucas
445 F.2d 1238, 40-43 (6th Cir. 1971)
cert. denied, 405 U.S. 922 (1972) 11,14

Glasser v. United States
315 U.S. 60, 70 (1942) 5

Linton v. Perini
656 F.2d 207,(6th Cir. 1981)
cert. denied, 454 U.S. 1162 (1982) 18,19

Morris v. Slappy
461 U.S. 11, 12 (1983) 11,12

Powell v. Alabama
287 U.S. 45, 53 (1932) 5

Releford v. United States
288 F.2d 298 (9th Cir. 1961) 19

Sampley v. Attorney General
786 F.2d 610, 613 (4th Cir.)
cert. denied, 478 U.S. 1008 (1986) 11,12

Strickland v. Washington
466 U.S. 668, 685 (1984) 7,8

Ungar v. Sarafite
376 U.S. 575, 589 (1964) 11,13

United States v. Accetturo
No. 88-5155 43 CrL 2013 (3rd Cir. 3/9/88) . . . 10

United States v. Cronic
466 U.S. 648 (1984) 7

United States v. Mardian
546 F.2d 973 (D.C. Cir. 1976) 19

United States v. Mitchell
777 F.2d 248, 256 (5th Cir. 1985) 11,12

United States v. Tramunti
513 F.2d 1087 (2nd Cir. 1975) 19

United States V. Wheat
No. 87-4 ____ U.S. _____ (5/23/88) 4,8

ARGUMENT I

Upon review of the Government's Brief In Opposition, Petitioner is compelled to respond to the inaccurate statements of facts and contentions asserted by the Government. One would assume that the Government would address the Petitioner's issues on the merits that were stated in the Petitioner's Brief. However, it is apparent that the Government has engaged in chicanery by cleverly rephrasing the questions that were originally presented for review. By redesigning the Petitioner's Questions, the Government has tried to shroud the constitutional issues. The result is a failure to respond to the "real" issues by attempting to mislead this Court as to what issues were raised. Question One of the Petitioner's Brief stated:

> WHETHER PETITIONER, GREGORY KIRK BELL, WAS DENIED A FAIR TRIAL IN THAT HE WAS FORCED TO PROCEED WITH COUNSEL NOT OF HIS CHOOSING AFTER RETAINED COUNSEL BECAME UNAVAILABLE MID-TRIAL?

Question One presented in the Government's Brief stated:

> WHETHER PETITIONER WAS IMPROPERLY DENIED REPRESENTATION BY COUNSEL OF HIS CHOICE?

The issue is not whether Petitioner was denied counsel of choice, but whether Petitioner was denied the "due process" of a fair trial because the trial court permitted Petitioner's 'chosen' counsel to abandon him at mid-trial, thereby forcing Petitioner to continue the trial with unchosen counsel.[1]

Furthermore, the Government alludes to an issue that was <u>never</u> raised by the Petitioner: Abuse of Discretion. In the first paragraph at the beginning of the Government's Argument, they have erroneously stated :

> 1. Petitioner contends (Pet. 11-31) that the trial court erred by requiring his case to proceed in the absence of his chosen counsel. More specifically, he maintains that the trial judge abused his discretion by failing to grant petitioner a severance or a continuance until Vaughn was again available to represent him. [Gov. p. 6].

It is interesting to note that Petitioner never raised this discretionary issue in his

---

1/ Unchosen counsel [Joseph Sharit] was an associate in chosen counsel's [Lane Vaughn] law firm. Sharit was never retained by Petitioner under any circumstances to represent him. Sharit's role was to conduct legal research during the trial for chosen counsel. Sharit did not participate in any pre-trial preparation and was absent from the court-room during the testimony of several government witnesses, one of which was the key and chief witness against Petitioner. Petitioner vehemently objected to Sharit's representation. [See A-18 to A-28].

Petition For Certiorari. This "new" issue is one that has been fabricated by the Government. The Petitioner's issues are constitutional violations of the Fifth and Sixth Amendment and not that of whether the trial judge abused his discretion.

Abuse of discretion is not the appropriate standard to be employed in determination of claims of deprivation of constitutional rights. Constitutional errors and questions of law are reviewed under the non-deferential de novo standard. This Court has stated:

> While this Court does not sit as in nisi prius to appraise contradictory factual questions, it will, where necessary to the determination of constitutional rights, make an independent examination of the facts, the findings, and the record so that it can determine for itself whether in the decision as to reasonableness the fundamental--i.e., constitutional criteria established by this Court have been respected. Beck v. Ohio, 379 U.S. 89, 13 L.Ed.2d 142, 85 S.Ct. 223 (1964).

The trial judge has a responsibility to protect the constitutional rights of the accused. Only subsequent to a defendant receiving these constitutional protections to which he is entitled can the issue of the trial court's discretion be raised. The trial court's discretion is not "triggered" until the defendant is afforded "due process".

The Government has also misrepresented the Appellate Court's opinion on page 5 of their Brief:

> ...and because the court of appeals concluded that petitioner suffered no prejudice as the result of the substitution of Sharit for Vaughn at the conclusion of the government's case, the court of appeals held that the trial court's decision to proceed despite Vaughn's absence was not an abuse of discretion. [Pet. App. A10-A11].

Upon a scrutinizing review of the Appellate Court's Opinion [App. A1-A15], Petitioner is unable to locate the Government's enhanced version relating to discretionary abuse. The Government has again injected an issue to further substantiate their argument and "cloud" the real issues.

In response to the Government's Argument 1.a, [page 7-12], Petitioner would suggest a further examination of this Court's most recent decision in Wheat v. United States, No. 87-4 (5/23/88) is necessitated. Although this case involves the same Sixth Amendment right to counsel of choice, the circumstances are quite dissimilar to the case at bar. Chief Justice Rehnquist characterized the issue as whether the District Court erred in declining petitioner's waiver of his right to conflict free counsel by refusing to permit petitioner's proposed substitution of attorneys. The question

> stem largely from an appreciation that a primary purpose of the Sixth Amendment is to grant a criminal defendant effective control over the conduct of his defense.....An obviously critical aspect of making a defense is choosing a person to serve as an assistant and representative. [43 CrL 3040].

This is specifically what Petitioner complains he was deprived of: Petitioner was unable to present his defense with the attorney he selected due to the fact that the trial court acquiesced to lead counsel's abandonment of Petitioner at mid-trial thus forcing the Petitioner to continue the trial with unwanted, unprepared, inexperienced, and subsequently ineffective counsel.

> THE COURT: Now, let me say for the record, to, here to Mr. Vaughn, at this time, I am just extremely sorry what has happened in his case and I am willing to excuse him and any time that he wants to leave he is free to leave, but the trial will go on, you know, with his associate counsel. Alright.
>
> MR. VAUGHN: Your Honor, the problem with that is that my associate counsel has never even been here for all of the testimony. He is not even admitted to practice in front of this court. He wasn't here for all of Muzevsky [Gov. chief witness against this Petitioner], he wasn't---
>
> THE COURT: Well, I've seen him in and out, I mean, here all of the time so it--you are free to leave if you want to and let associate counsel handle the case or you are free to remain.
>
> [TR. VOL. VI, p. 243]

In claiming ineffective assistance of counsel because of the trial court's denial of a motion

for a severance or continuance based upon the unavailability of retained counsel, the Petitioner need not establish actual prejudice in order to be entitled to relief. The denial of effective assistance of counsel alleged herein is not based upon a conflict of interest or upon an allegation that counsel was actually ineffective. Rather, the claim is based upon an "actual or constructive denial of assistance of counsel altogether", in which prejudice is so likely that it is assumed as a matter of law without inquiry into the facts of the individual case. United States v. Cronic, 466 U.S. 648 (1984); Strickland v. Washington, 466 U.S. 668 (1984). The substitute counsel's ineffectiveness at trial was irrelevant to the impact of the denial of the right to chosen counsel.

The right to choice of counsel is distinct from the right to adequate assistance of counsel. Denial of this qualified right is reversible error regardless of whether prejudice is shown.

> That a person who happens to be a lawyer is present at trial alongside the accused, however, is not enough to satisfy the constitutional command. The Sixth Amendment recognizes the right to the assistance of counsel because it envisions counsel's

BEST AVAIL

playing a role that is critical to the ability of the adversarial system to produce just results. An accused is entitled to be assisted by an attorney, whether retained or appointed,who plays the role necessary to ensure that the trial is fair..... Counsel...has a duty to bring to bear such skill and knowledge as will renderthe trial a reliable adversarial testing process. Strickland v. Washington, 466 U.S. 668,685 (1984).

For the similar reasons why this Court granted certiorari in Wheat v. United States, (because the Courts of Appeals have expressed substantial disagreement about when a district court may override a defendant's waiver of his attorney's conflict of interest), the Petitioner respectfully requests that this Court grant certiorari in his cause. There is a conflict among the lower courts as to whether a trial should continue in the absence of a defendant's 'chosen' counsel. Petitioner has provided an ample number of cases in his Brief that substantiate the unharmonious decisions reflected in the lower courts. Some courts customarily grant continuances, yet others require the defendant to proceed no matter what circumstances have occurred.

This case is of national significance as it could affect thousands of criminal litigants. A

ABLE COPY

ruling in the case at bar would enable this Court to establish precedent in this 'gray' area of a defendant's Sixth Amendment right to counsel of choice and possibly clarify the Court's position on that choice to effective assistance of counsel. Not only should a defendant receive a fair trial, but only by choosing his counsel will he be guaranteed effective counsel who is prepared to assume an adversarial role in the zealous spirit of defense theory. One of the most serious flaws in the criminal justice system today is that many defendants are provided with ineffective counsel. If a defendant selects an attorney of choice, he has done so for evident reasons. To force that defendant to continue a trial when that 'chosen' attorney becomes unavailable is to deprive such defendant of the most fundamental of constitutional rights. The Court is lacking a 'clear' vision in this area and needs to distinguish the difference between the discretion deferred to a trial court as compared to the denial of counsel of choice.

Another case that exemplifies Petitioner's argument [discovered subsequent to the filing

of Petitioner's Brief, 2/29/88] that was heard in the Third Circuit was United States v. Accetturo (Appeal of Boylan) No. 88-5155, CA 3, 3/9/88, 43 CrL 2013. The appellate court rejected a lawyer's objections to being appointed as substitute counsel for a criminal defendant four months into a complex trial. The appointment was triggered by the sudden unavailability of lead counsel due to terminal illness. Due to the fact that the attorney was granted 24 days to prepare for the case, had been serving as local counsel, had done significant pretrial work for the defendant, and the defendant never expressed any objection to the lawyer's qualifications, the Third Circuit upheld the courts authority to appoint counsel after the start of trial.

This case is distinguishable from the case at bar for the following reasons:

(1) Substitute counsel was granted a 24 day continuance to prepare the case. Sharit was denied a continuance.

(2) Was familiar with the case as he had participated in pretrial motions the previous 14 months. Sharit did not participate in any pre-trial preparation.

(3) Had filed a previous notice of appearance as local counsel. Sharit never filed a notice of appearance in behalf of Petitioner before the court.

(4) Substitute counsel was accepted by the defendant to continue representing his interests. Petitioner objected to Sharit representing him in the absence of his chosen counsel.

The Third Circuit also noted that:

> The focus of the inquiry is whether the court's undoubted power to appoint counsel for a criminal defendant in need of such counsel is negated because the trial in which counsel is required has been underway for some time. No reported opinion on this issue has been called to our attention. [43 CrL 2013]

The Government argues that trial courts must be accorded wide discretion in ruling on continuances even though constitutional rights might be violated. The Government contends that the interpretations of law derived from the following authorities can be applied to the case at bar: United States v. Mitchell, 777 F.2d 248,256 (5th Cir. 1985); Sampley v. Attorney General, 786 F.2d 610,613 (4th Cir.) cert denied, 478 U.S. 1008 (1986); Morris v. Slappy, 461 U.S. 11,12 (1983); Ungar v. Sarafite, 376 U.S. 575,589 (1964); and Giacalone v. Lucas, 445 F.2d 1238,40-43 (6th Cir. 1971) cert. denied, 405 U.S. 922 (1972). However, these cases were distinguished by specific facts;facts that did not occur in the case at bar.

BEST AVAILABLE COPY

BEST AVAILABLE COPY

In United States v. Mitchell, supra, Mitchell attempted to manipulate the court's schedule by retaining an attorney whom he knew to have a conflict with the trial date. Since Mitchell had a one-month opportunity to retain other counsel before the trial date, his request for a continuance was judged to be in bad faith for the purpose of a delay.

In Sampley v. Attorney General, supra, the defendant, after numerous continuances, failed to hire an attorney, when in fact he had been given a month to secure counsel. A continuance was denied the day of trial. Since Sampley had been given a fair opportunity to secure counsel of his own choice and availed not to, a continuance was properly denied.

In Morris v. Slappy, supra, six days before a scheduled trial, a substitute public defender was assigned to represent a defendant after the original public defender became ill. At the opening of the trial, the defendant made a motion for a continuance, claiming that the attorney did not have enough time to prepare the case. The trial court denied the motion. Because the newly assigned substitute counsel acknowledged to the trial court that he was fully prepared and that a further continuance would

BEST AVAILABLE COPY

not benefit him in presenting the case, the Supreme Court held that the defendant was not denied a fair trial as a result of his requested attorney's unavailability.

In the case at bar, Sharit and Petitioner immediately objected to proceeding to trial without retained counsel Vaughn being present. At no time did Sharit or Petitioner indicate that they were prepared to continue the trial. In fact, Vaughn had earlier advised the court that Sharit was not present for the testimony of the chief government's witness against the Petitioner and was also not admitted to practice before the court.

In Ungar v. Sarafite, supra, after two continuances were granted to allow a second lawyer to appear for the defendant, another continuance for one week was requested in order to allow that lawyer to familiarize himself with the case. The request was denied. Since Ungar had been afforded sufficien time to hire counsel who could be available, the issues were limited and clear cut (criminal contempt and the fact that Ungar himself was a lawyer familia with the court's practice of not granting adjournments, this Supreme Court held that Ungar was not denied a fair hearing.

In Giacalone v. Lucas, supra, a defendant's attorney was unavailable for trial due to his hospitalization, but the attorney's partner and an associate were available, were prepared, and proceeded to competently try the case. A request for a continuance was denied.

Unlike the case at bar, both of Giacalone's associate lawyers shared the responsibilities of examination of witnesses and arguing to the jury. All three lawyers were familiar with the case. Also, two continuances had previously been granted and the defendant's request for a third continuance was virtually open ended, as the delay could have been as much as one-third of a year before defendant's lead counsel would be well enough to resume his role in the trial. Giacalone is distinguishable in that the availability of alternative counsel of a like caliber was present.

Upon examination of the qualifications of Vaughn as compared to Sharit [A-20, A27-A28], it is evident that Sharit is lacking experience in the field of criminal defense practice. Not only was Sharit absent during crucial testimony of a chief witness, but Sharit never shared in any

of the responsibilities of cross examining the Government's witnesses.

The Government alleges that Vaughn had earlier obtained a continuance by claiming medical problems that subsequently proved unsubstantiated, and therefore was engaging in dilatory tactics. At the very least, these contentions are specious. The record will reflect the open animosity between Vaughn and the trial court during the course of the proceedings. The court's comments were delivered after Vaughn had departed. Vaughn was never able to refute the misrepresentations referred to by the court. Therefore, sworn affidavits were procured to aver Petitioner and Vaughn's contentions. [See A22-A24].

Secondly, concerning the duration of a continuance, the trial court never inquired how long Vaughn might need to accommodate his personal needs. The trial court was more concerned with concluding the trial than insuring Petitioner's constitutional right to chosen counsel's presence.

Thirdly, the Government argues that since Sharit had earlier participated in the defense, he therefore could reasonably be expected to be conversant with the case. However, the <u>only</u>

BEST AVAILABLE COPY

representation that Sharit made in behalf of the Petitioner was when he proffered the facts in arguing a motion to strike Rule 404(b) evidence. Vaughn had delegated to Sharit the task of researching the case law on exclusionary evidence during the course of the trial. This motion was argued orally and not in the presence of the jury. After Sharit had proffered a part of the argument, the trial court prevented Vaughn from further expressing his assertions of the facts. Sharit was ordered by the trial court to soley continue the argument without the assistance of Vaughn. [TR. VOL. III, pages 236-245]. The Motion To Strike Rule 404(b) Evidence and the supporting Memorandum was filed in open court and exclusively submitted by Vaughn.

Lastly, the Government argues that:

> ...because petitioner had not subpoenaed any witnesses to testify on his own behalf, it did not appear that Sharit would be required to present a defense case. After fully reviewing the record, both courts below found that Sharit ably represented petitioner in fulfilling these responsibilities. [Gov. p. 9].

This argument rests on speculation of the most dubious kind. How is it possible that Sharit could have effectively represented the Petitioner when in fact he was not present during the testimony of Government witnesses who testified against the Petitioner???

How could Sharit have effectively presented a defense when he was not cognizant of all the facts presented by the Government???

The assumption that Petitioner is not going to present a defense because he has not 'subpoenaed any witnesses' borders on the realm of absurdity. The precise issue is that Petitioner was prevented from airing, (much less establishing), his defense when Vaughn departed from the trial. The Government has failed to recognize the level of importance that Vaughn attained during the trial

1) Only Vaughn had cross-examined the witnesses and was therefore cognizant of their testimony.

2) Only Vaughn was familiar with the case and aware of the existence of inculpatory and exculpatory evidence.

3) Only Vaughn was adequately skilled and knowledgeable in the theory of defense, defense strategy, and the oratory skills for delivering an effective closing argument.

4) Only Vaughn was familiar with the specific defense exhibits that were selectively introduced by Vaughn during the Government's case in order to establish the groundwork for Petitioner's defense.

5) Only Vaughn was familiar with the complex association between the Government witnesses and these defense exhibits.

Sharit was not cognizant of the aforementioned facts nor did he possess the expertise and attributes of Vaughn.

BEST AVAILABLE COPY

Vaughn would have made a difference in the outcome of the trial. More specifically, Vaughn would have presented documentary evidence; witnesses who were waiting to testify to his relevant defense theories; applying such defense theories in the oral summation; and requesting the addition or modification of jury instructions. Had these four factors been included in the defense of the instant case, the jury result would have been different.

The Government additionally argues that the cases cited by the Petitioner are not analogous to the case at bar. The Government is entitled to their interpretations of the law as derived from these cases, but only upon this Court's closer scrutiny of the facts in each case will the relevant similarities be revealed.

In Gandy v. Alabama, 569 F.2d 1318, (5th Cir. 1978), the issue is not that of whether the motion for a continuance was made before the trial started, but the failure of the trial court to assure retained counsel's presence at the trial is what constituted a denial of due process under the Sixth Amendment.

In Linton v. Perini, 656 F.2d 207 (6th Cir.

BEST AVAILABLE COPY

1981), cert. denied,454 U.S. 1162 (1982), the Sixth Circuit held that a defendant was unconstitutionally denied the right to select counsel of his own choice after defendant was forced to go to trial with an attorney appointed by the court. The trial court had refused to grant a continuance to retained attorney who could not prepare for the trial in the ten days allowed by the court. Like the case at bar, Linton involved serious felony counts and the basic issue was the credibility of the witnesses, of which appointed counsel was not able to adequately investigate and prepare a plan of defense.

In Releford v. United States, 288 F.2d 298 (9th Cir. 1961), the constitutional violation occurred when the trial judge ordered another attorney to represent the defendant over the defendant's objections and in the face of the second attorney's reluctance after the retained attorney became hospitalized.

Two cases that closely resemble the facts of the instant case are United States v. Mardian, 546 F.2d 973 (D.C. Cir. 1976) and United States v. Tramunti, 513 F.2d 1087 (2nd Cir.), cert. denied, 423 U.S. 832 (1975). These cases were previously

BEST AVAILABLE COPY

examined in the Petitioner's brief [Pet. 22, 27], and so strongly support the Petitioner's contentions that further discussion of such cases is not warranted to rebut the Government's assertions.

Petitioner has conclusively demonstrated that his right to choose the counsel to present his defense was unconstitutionally abridged by the trial court. Therefore, this Court should grant a writ of certiorari to correct the injustice inflicted upon Petitioner.

ARGUMENT II

Petitioner is of the opinion that the arguement as set forth in the Petitioner's Brief is of substantive merit and does not need to be repeated for the sake of redundancy. However, to ascertain that this Court is cognizant of the "real" facts, Petitioner would direct the Court's attention to the Government's Brief, page 4-5. The Government has incorrectly stated that the "marijuana packages were similar to those introduced during the trial in New Orleans." The issue that Petitioner complains of is that the boxes introduced into evidence in trial in Roanoke were the exact identical boxes submitted before the jury in New Orleans.

IN THE

SUPREME COURT OF THE UNITED STATES

1988 TERM

GREGORY KIRK BELL,

PETITIONER,

V.

UNITED STATES OF AMERICA,

RESPONDENT

PROOF OF SERVICE

I, GREGORY KIRK BELL, PRO SE, after being duly sworn, hereby certify that a true copy of the foregoing REPLY BRIEF FOR THE PETITIONER was deposited in the United States mail, first class postage prepaid, this 21 day of June, 1988, addressed to the following counsel for the Respondent, pursuant to the Rules of the Supreme Court, Rule 28.5(c).

Office of the United States Attorney
A.U.S.A. Karen Peters
P.O. Box 1709
Roanoke, Virginia
24008

Solicitor General
Department of Justice
Washington, D.C.
20530

GREGORY KIRK BELL--PRO SE

STATE OF FLORIDA
COUNTY OF OKALOOSA

Sworn to and subscribed before me this

15 day of June, 1988.

NOTARY PUBLIC

MY COMMISSION EXPIRES:

Notary Public, State of Florida
My Commission Expires Aug. 16, 1988
Bonded Thru Troy Fain - Insurance, Inc.